

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

STATE FARM FIRE AND CASUALTY  
COMPANY,

Plaintiff,

vs.

VALORIE BARRETT and ANTHONY  
BARRETT,

Defendants,

and

VALORIE BARRETT,

Third-Party Plaintiff,

vs.

BANCOKLAHOMA MORTGAGE  
CORPORATION, an Oklahoma  
corporation, and PAUL DAVIS  
SYSTEMS OF TULSA, INC.,  
an Oklahoma corporation,

Third-Party Defendants.

**FILED**

AUG 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-237-BU

ENTERED ON DOCKET

DATE AUG 30 1996

**ORDER**

This matter comes before the Court upon the Motion for Entry of Judgment as a Matter of Law, or, in the Alternative for New Trial filed by Defendants, Valorie Barrett and Anthony Barrett. Plaintiff, State Farm Fire and Casualty Company, has responded to the motion and Defendants have replied thereto. Upon due consideration of the parties' submissions, the Court makes its determination.

Pursuant to Rule 50(b), Fed. R. Civ. P., Defendants move for judgment as a matter of law on the following grounds:

1. the Court erred in permitting Plaintiff to reopen its

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case-in-chief to admit into evidence the insurance policy;

2. Plaintiff failed to present competent evidence that the fire at Defendants' home was intentionally set; and

3. Plaintiff failed to present any evidence (i) as to its investigation or denial of Defendants' insurance claim and (ii) as to the materiality of Defendants' misrepresentations.

In the alternative, Defendants, pursuant to Rule 59, Fed. R. Civ. P., move for a new trial on the following grounds:

1. the Court erred in failing to grant a judgment as a matter of law in favor of Defendants;

2. the Court erred in permitting Plaintiff to reopen its case-in-chief to admit into evidence the insurance policy;

3. the Court erred in permitting Plaintiff's Claim Superintendent, Richard Dickson, to testify as to the denial of Defendants' insurance claim in Plaintiff's rebuttal; and

4. the jury verdict was inherently contradictory evidencing confusion or failure of the jury to follow the Court's instructions.

A moving party is entitled to a judgment as a matter of law under Rule 50 only "if the evidence conclusively favors the moving party and is susceptible to no reasonable inferences that would sustain the nonmoving party's position." Considine v. Newspaper Agency Corp., 43 F.3d 1349, 1363 (10th Cir. 1994) (quoting Whalen v. Unit Rig, Inc., 974 F.2d 1248, 1251 (10th Cir. 1992), cert. denied, 113 S.Ct. 1417 (1993)). In determining a motion under Rule 50, the Court may not weigh the evidence, pass on the credibility of the

witnesses, or substitute its conclusions for that of the jury. Harolds Stores, Inc. v. Dillard Dept. Stores, Inc., 82 F.3d 1533, 1546 (10th Cir. 1996). Additionally, the Court must view the evidence and construe all inferences in a light most favorable to the nonmoving party. Compton v. Subaru of America, Inc., 82 F.3d 1513, 1520 (10th Cir. 1996). If, viewing the record most favorably to the nonmoving party, there is evidence upon which the jury could properly return a verdict for the nonmoving party, denial of a Rule 50 motion is appropriate. Harolds Stores, Inc., 82 F.3d at 1546.<sup>1</sup>

Generally, motions for new trial under Rule 59 are committed to the sound discretion of the district court. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984). In reviewing a motion for new trial, the court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." Id. at 553. "[T]he party seeking to set aside a jury verdict must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence." White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983).

Guided by the foregoing principles, the Court finds that Defendants are not entitled to a judgment as a matter of law or a


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<sup>1</sup>In its response brief, Plaintiff asserts that Defendants cannot raise their Rule 50 motion as they failed to renew their motion at the end of all of the evidence. Similar to Plaintiff, the Court does not recall Defendants renewing their Rule 50 motion. However, because the Court does not have a copy of the actual trial transcript and Defendants did initially move for judgment as a matter of law at the end of Plaintiff's case-in-chief, the Court opines that Defendants' Rule 50 motion should be addressed.

new trial. The Court concludes that there was sufficient evidence in the record upon which the jury could return a verdict in favor of Plaintiff. The evidence did not conclusively favor Defendants, as argued. In addition, the Court finds that it made no error in permitting Plaintiff to reopen its case-in-chief to introduce the insurance policy. In the Court's view, the insurance policy was inadvertently omitted. Moreover, the purpose of a Rule 50 motion during trial is to afford the adverse party the opportunity to correct any possible infirmities in the proof presented. See, 5A James W. Moore et al., Moore's Federal Practice, ¶ 50.04, pp. 50-51--50-53 (2d ed. 1996); Advisory Committee Note to the 1991 amendments to Rule 50; See also, Grubb v. Fed. Deposit Ins. Corp., 868 F.2d 1151, 1160 n. 12 (10th Cir. 1989)("[t]he purpose of a directed verdict is to allow the nonmoving party the opportunity to reopen its case and present additional evidence to cure a deficiency that otherwise would have prevented the case from reaching the jury"). The Court further finds that it did not err in allowing Mr. Dickson to testify during Plaintiff's rebuttal. In the Court's view, Mr. Dickson's testimony was proper rebuttal testimony. Furthermore, the Court finds that Defendants' failure to object to the jury verdict prior to dismissal of the jury constituted a waiver of any objection relating to its inconsistency. Thompson v. State Farm Fire and Cas. Co., 34 F.3d 932, 944 (10th Cir. 1994). However, in any event, the Court concludes that the jury verdict was neither inconsistent nor contradictory.

Accordingly, the Motion for Entry of Judgment as a Matter of Law, or, in the Alternative for New Trial (Docket Entry #156) filed by Defendants, Valorie Barrett and Anthony Barrett is **DENIED**.

ENTERED this 29<sup>th</sup> day of August, 1996.

  
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MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

ENTERED ON  
DATE 8-30-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 29 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

TULSA TYPOGRAPHICAL  
UNION NO. 403

Plaintiff,

v.

Case No. 94 C 996 H


WORLD PUBLISHING  
COMPANY,

Defendant.

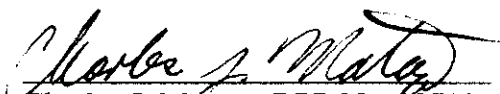
**AGREED ORDER OF DISMISSAL**

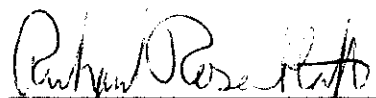
Comes now the parties in the referenced matter and state to the Court that they desire this matter be dismissed in its entirety and with prejudice.

**IT IS SO ORDERED.**

  
Sven Erik Holmes  
United States District Judge

Entered this 28<sup>TH</sup> day of August, 1996.

  
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King & Ballow  
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(303) 721-7399  
Attorney for Defendant

ENTERED ON DOCKET

DATE 8/30/96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ANTHONY D. PIPINO,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of Social Security,

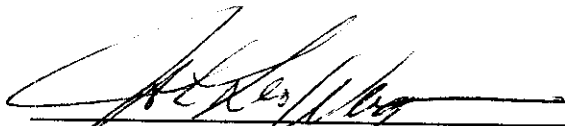
Defendant.

Case No: 95-C-453-W ✓

**JUDGMENT**

Judgment is entered in favor of the Commissioner of Social Security in  
accordance with this court's Order filed August 28, 1996.

Dated this 28<sup>th</sup> day of August, 1996.



JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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ENTERED ON DOCKET

DATE 8/30/96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ANTHONY D. PIPINO,

Plaintiff,

v.

SHIRLEY S. CHATER,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

Case No. 95-C-453-W /

**ORDER**

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(l) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Dana E. McDonald , (the "ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence

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<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.



in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.<sup>2</sup>

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.<sup>3</sup> He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work activities at the light level, limited to occasional bending, stooping, and lifting more than ten pounds. The ALJ concluded that claimant was unable to perform his past relevant work, either as a pump assembler or as a laundry route driver. He found that claimant was 44 years old on March 24, 1990, the pertinent alleged onset date, and,

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<sup>2</sup> Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

<sup>3</sup> The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

as a 44-year-old was considered a "younger individual" at all time material to this decision. He found that claimant had a 12th grade education, and the issue of transferability of skills was immaterial, but he had the following transferable skills: knowledge of parts, assembly, blueprints, instruction sheets, billing and ordering material, small hand tools, driving, and delivering materials. Finally, the ALJ concluded that, although the claimant's additional nonexertional limitations did not enable him to perform the full range of light work, because he could only occasionally lift more than ten pounds, there were a significant number of jobs in the national economy which he could perform, such as mechanical assembly, delivery-courier, paralegal, order clerk, and sedentary assembly. Having determined that claimant could do some light work, the ALJ concluded that he was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ failed to consider the evidence of claimant's significant pain;
- (2) The ALJ failed to consider the issue of drowsiness as a side effect of claimant's medications and the need to use a heating pad on his back several times a day;
- (3) The ALJ failed to give substantial weight to the opinion of claimant's treating physician; and
- (4) Substantial weight does not support the ALJ's decision that claimant can do light work.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir.

1984).

Claimant sustained an injury to his lower back while working for National Oil Well Co. in December of 1988 (TR 116-118, 130, 251). He was assigned light duty work, such as office work, and continued to work until September 22, 1989 (TR 130, 175). He received worker's compensation temporary disability benefits from September 25, 1989 until December 9, 1990, and then received a payment for permanent partial disability for a 15% rating to the body as a whole (TR 116-118). He claims he has been unable to work since March 24, 1990.

Dr. L.M. Milton has treated claimant since 1988 (TR 192-251). His office is in McAlester, Oklahoma. The ALJ noted that claimant regularly drove to McAlester for treatment, so he could tolerate sitting in a car for one hour each way regularly (TR 20). Dr. Milton consistently referred to claimant as having a lumbar myofascial "strain" after March of 1990 (TR 194, 197, 200, 204, 206, 208, 210, 212, 213, 215, 217, 219-225, 275-276).

On September 25, 1989, claimant was seen by Dr. James Rodgers, a neurologist, who reviewed lumbar x-rays and concluded claimant had no "significant discogenic pathology," but merely "some spondylosis changes, minimal without spinal cord compression or stenosis." (TR 168). Dr. Rodgers also reported "a slight bulge of the disc at L3-4," but "no dramatic thecal compression, root compression, or dramatic stenosis," "no dramatic disc space narrowing except at L5-S1," and "no blastic or lytic lesions or fracture or dislocation." (TR 168). Dr. Rodgers concluded that claimant needed to lose weight and "recondition" his lumbar and thoracic

muscles. (TR 168). He referred claimant to the "CHART" rehabilitation program for a vigorous work hardening program. (TR 168). While Dr. Billings stated that the insurance company refused to pay for this treatment, so nothing was done (TR 175), claimant testified that he went to the program for two or three months, but it did not help him return to work (TR 52).

On February 21, 1990, Dr. Anthony Billings reviewed a CT scan and reported a "bulging disc at the L3-4 level" and "a large spur on the right side emanating from the body of the L5 vertebra" which narrowed the opening through which the nerve passed (TR 172). He recommended back surgery at the L5-S1 level (TR 172). Claimant testified that no doctor had recommended surgery (TR 152).

Claimant was examined by Dr. Paul Krautter on July 27, 1993 for the social security administration (TR 185-190). The doctor found no muscle spasms, some tenderness, some restriction of back movement, and a stable gait (TR 185-190). Two residual functional capacity assessments were done on March 20, 1990, and August 20, 1993, and the doctors concluded claimant could occasionally lift fifty pounds, frequently lift twenty-five pounds, and stand, walk, and sit six hours of an eight-hour workday, and had unlimited ability to push and pull (TR 75-82, 92-98).

A vocational expert testified that an individual who is claimant's age and has the same education and work experience and can do light work with limited bending, stooping, and lifting and has some difficulty concentrating due to back pain or medication could do light mechanical assembly, paralegal, courier driver, and sedentary order clerk jobs (TR 60-62). The same individual could do sedentary

assembly and order clerk jobs.

Claimant takes several prescriptions for back pain, including dolobid, flexeril, darvocet, and pamelor (TR 157, 275). He testified that he goes to school, studies an hour and a half several times a day, and watches television (TR 50-51, 53). He also stated that he walks a mile twice a week for exercise (TR 51). In his disability application he stated that he cleans his house, does laundry, shops, walks in the park for three hours on weekends, drives, visits friends, and goes to church (TR 152-154).

There is no merit to claimant's contentions. The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the

pain is inevitable. Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). He must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a back problem producing pain, the ALJ was required to consider the assertions of severe pain and to decide whether he believed them. Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain . . . ." Luna, 834 F.2d at 165.

The ALJ considered claimant's allegations of pain and limitations under the social security regulations and Luna and concluded:

The claimant contends, essentially, that he is and has been totally disabled as a result of the bending, lifting, stooping, and carrying limitations associated with pain from his low back impairment. While the claimant had reported "aching" back pain to his treating physician, he alleged in the hearing that his pain is so severe it totally disables him.

. . . .

I find the claimant's allegations that he suffers from totally disabling pain must be rejected because of the lack of objective findings by claimant's treating physicians, the lack of objective findings by examining physicians, evidence indicating that the claimant himself has reported less severe pain to his treating physician, the fact that the claimant has not used devices such as canes and crutches to assist him in ambulating, evidence that the claimant has reported his ability to walk

'2-3 miles, 3-4 times per wk', [although he stated at the hearing he walked less distance less frequently] drive significant distances in his car, the lack of frequent treatment for pain, and the claimant's apparent mechanism for coping with pain which permits him to regularly attend class, study, and do necessary research in connection with his laudable efforts to retrain himself in the paralegal area.

The undersigned finds that while the claimant undoubtedly has pain, pain which on occasion is severe upon heavy exertion, exertion which he has been advised to avoid, there is no evidence of severe chronic intractable pain or more than mild pain with lighter activities.

(TR 21-23).

Medical records must be consistent with the nonmedical testimony as to the severity of the pain. Talley v. Sullivan, 908 F.2d 585, 587 (10th Cir. 1990). The ALJ may discount subjective complaints of pain when there is a lack of objective corroborative evidence. Diaz v. Secretary of Health & Human Servs., 898 F.2d 774, 777 (10th Cir. 1990). The ALJ properly concluded that claimant does not suffer disabling pain.

There is also no merit to the contention that the ALJ erred in failing to consider claimant's statements that his medication caused drowsiness and he needed to use a heating pad on his back several times a day. A claimant's allegations of adverse side effects cannot establish the fact that they exist. Hamilton v. Secretary of Health & Human Servs., 961 F.2d 1495, 1499 (10th Cir. 1992). Claimant never complained of any problems with side effects to a physician, and no doctor reported problems with a prescribed dosage. Plaintiff admitted he could spend a significant part of each day attending classes, studying, and doing research (TR 37-39).

There is no merit to claimant's argument that the ALJ failed to give substantial

weight to the opinion of claimant's treating physician. While Dr. Milton, the treating physician, noted that plaintiff should "avoid bending, stooping, and lifting" (TR 194-226, 271-77), this did not mean that claimant could not perform any bending, stooping, or lifting and thus was unable to perform light work. "Light work" involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds . . . . [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b). Social Security Ruling 83-10 states that "[t]he lifting requirement for the majority of light jobs can be accomplished with occasional, rather than frequent, stooping."

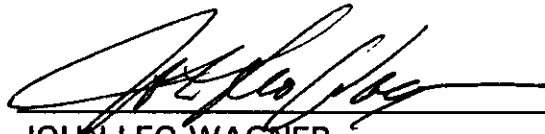
It must be noted that no physician ever reported that plaintiff was totally disabled or unable to work. Potter v. Secretary of Health & Human Servs., 905 F.2d 1346, 1349 (10th Cir. 1990). Instead, the progress notes of his treating physician show that although plaintiff complained often of recurring back pain, his condition was usually "mild" or "moderate" (TR 193-226, 271-77).

Finally, there is substantial evidence that claimant can do the light work with occasionally lifting of ten to twenty pounds suggested by the vocational expert (TR 65-68). The jobs, including assembly, courier, paralegal, and order clerk, would allow him to move from sitting to standing positions occasionally and require little lifting (TR 64-65).

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision is affirmed.



Dated this 28<sup>th</sup> day of August, 1996.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

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**FILED**  
AUG 29 1996

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

TERESSA GRAYSON, As Special  
Administratrix of the Estate  
of Simon Adrian Meggs, Deceased,

Plaintiff,

vs.

No. 95-C-771-B ✓

FIRST HEALTHCARE CORPORATION,  
A Corporation, d/b/a Heritage  
Manor Nursing and Convalescent  
Center, THE HILLHAVEN  
CORPORATION, A Corporation, d/b/a  
Heritage Manor Nursing and  
Convalescent Center, NME PROPERTIES,  
INC., A Corporation, formerly  
Hillhaven, Inc., d/b/a Heritage  
Manor Nursing and Convalescent  
Center; and ALLAN SUPAK, M.D.,  
An Individual,

Defendants.

ENTERED ON DOCKET  
DATE **AUG 30 1996**

ORDER

The Court has for consideration Defendants Hillhaven Corporation ("Hillhaven") and NME Properties, Inc.'s, ("NME Properties") combined Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56. (Docket # 12). After careful review of the record and applicable legal authority, the Court hereby GRANTS NME Properties' Motion for Summary Judgment, and DENIES Hillhaven's Motion for Summary Judgment.

Undisputed Facts

1. Plaintiff Teresa Grayson ("Plaintiff") brings this action for negligence, contending that during the time frame of August, 1993 through November, 1993, Plaintiff's decedent, Simon Adrian

Meggs ("Meggs"), was a resident at the Heritage Manor Nursing and Convalescent Center in Bartlesville, Oklahoma. (Defendants' Exhibit 1).

2. The Heritage Manor Nursing and Convalescent Center was owned and operated by First Healthcare Corporation ("First Healthcare") during the time frame of August through November, 1993, when Simon Adrian Meggs was a resident at the facility. (Defendants' Exhibit 2).

3. First Healthcare is a wholly-owned subsidiary of Hillhaven, its parent corporation. (Plaintiff's Exhibit 3).

4. NME Properties, Incorporated was formerly Hillhaven. (Plaintiff's Exhibit 1, pg.1).

5. Following the November 1992 sale of Heritage Manor Nursing Home by NME Properties to First Healthcare, Heritage Manor Nursing Home continued to identify Hillhaven as the proprietor. (Plaintiff's Exhibits 5 and 6).

6. From August 1, 1993 through June 22, 1995, inclusive, the Oklahoma State Department of Health issued licenses to conduct and maintain the Heritage Manor Nursing and Convalescent Center to First Healthcare. (Defendants' Exhibit 3).

7. Specifically, a license to conduct and maintain the Heritage Manor Nursing and Convalescent Center was issued by the State of Oklahoma on April 2, 1992, with an expiration date of June 30, 1994. The dates for the subject license are inclusive of the dates in which Meggs was a resident at the subject facility. (Defendants' Exhibit 3).

8. First Healthcare and Hillhaven share common officers, directors, and appointed officers. (Plaintiff's Exhibit 7 and 8).<sup>1</sup>

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<sup>1</sup>The Court notes Plaintiff's Exhibits 7 and 8 are lists of the purported Directors and Officers of First Healthcare and Hillhaven, respectively. Generally, the Court would not rely on such "evidence" as the exhibits are wholly lacking in many respects. Specifically, neither list

9. A Nursing Home Professional Liability Insurance Policy covering Heritage Manor Nursing Home from June 1, 1993 through June 1, 1994 lists the named insureds of said facility as Hillhaven and NME, Incorporated. (Plaintiff's Exhibit 10).

### **The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment**

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

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contains a date reflecting the term served by these purported directors and officers, and no supporting evidence is provided showing these lists were accurate during the relevant time frame of this action, August, 1993 through November, 1993. However, since Hillhaven and NME Properties did not dispute Plaintiff's Exhibits 7 and 8, the Court will consider such for whatever evidentiary value they may possess.

A recent Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . .

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521."

#### Legal Analysis

Plaintiff Teresa Grayson, as special administratrix of the estate of Meggs, brings this diversity action against First Healthcare, Hillhaven and NME Properties for negligence and willful, wanton and reckless care of Meggs. Plaintiff contends the named Defendants neglected the bed-ridden Meggs, thus allowing his lower extremities to develop decubitus bedsores. It is alleged these bedsores became gangrenous precipitating the amputation of Megg's legs above the knees. Plaintiff brings this action against First Healthcare as the owner/operator of Heritage Manor Nursing Home. Plaintiff asserts Hillhaven and NME Properties are liable for any damages to Meggs on the theory First Healthcare is an instrumentality or the alter ego of Hillhaven and NME Properties, thus allowing the corporate identities of Hillhaven and NME Properties to be disregarded.

A federal court sitting in a diversity action applies the law of the forum state in which it sits. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). The general rule in Oklahoma is that a corporation is a distinct legal entity separate and apart from other legal entities

or stockholders. Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corp., 877 P.2d 605 (Okla.App. 1994). This fiction may be avoided if it is established separate corporate existence is a design or scheme to perpetuate fraud or where a corporation is so organized and controlled and its affairs so conducted that it is merely an instrumentality or alter ego of another. Wallace v. Tulsa Yellow Cab Taxi & Baggage Co., 178 Okla. 15, 61 P.2d 645 (1936).

The question whether an allegedly dominate corporation may be held liable for a subsidiaries' tort hinges primarily on control. In Frazier v. Bryan Memorial Hosp. Authority, 775 P.2d 281 (Okla. 1989), the Oklahoma Supreme Court listed factors which may be considered *at trial* in a determination of whether a parent corporation controls a subsidiary. These factors are whether (1) the parent corporation owns all or most of the subsidiary's stock, (2) the corporations have common directors or officers, (3) the parent provides financing to its subsidiary, (4) the dominant corporation subscribes to all the other's stock, (5) the subordinate corporation is grossly undercapitalized, (6) the parent pays the salaries, expenses or losses of the subsidiary, (7) almost all of the subsidiary's business is with the parent or assets of the former were conveyed from the latter, (8) the parent refers to its subsidiary as a division or department, (9) the subsidiary's officers or directors follow directions from the parent corporation, and (10) the legal formalities for keeping the entities separate and independent are observed.

Plaintiff claims First Healthcare is an instrumentality or the alter ego of NME Properties. The Court is unpersuaded by the minimal arguments and/or authority cited by Plaintiff in support of this assertion. The Court notes Plaintiff attached ten (10) Exhibits to her brief in response to the instant motion. Plaintiff's Exhibit 1 is the *only* exhibit which contains any reference to NME Properties. Exhibit 1 is a Purchase and Sale Agreement between NME Properties and First Healthcare executed

in November, 1992.<sup>2</sup> Plaintiff wholly fails to show how this Purchase and Sale Agreement evidences control of First Healthcare by NME Properties. Plaintiff fails to connect NME Properties in any other way to First Healthcare. In the absence of evidence tending to show a relationship between NME Properties and First Healthcare other than that of Buyer and Seller, Plaintiff has failed to raise a fact question whether NME Properties controls First Healthcare. Accordingly, the Court GRANTS NME Properties' Motion for Summary Judgment.

In her attempt to raise a fact question whether Hillhaven exercises control over First Healthcare, Plaintiff relies on Disclosure of Ownership and Control Interest Statements filed by First Healthcare with the Department of Health and Human Services for the years 1992-94, inclusive. These documents reveal First Healthcare is a wholly-owned subsidiary of Hillhaven. Plaintiff's Exhibits 2-4. Plaintiff next offers Exhibits 5 and 6 which are copies of advertisements placed in the Southwestern Bell Yellow Pages for Heritage Nursing Centers of Bartlesville. Included at the bottom center of each advertisement is the Hillhaven name and logo. Additionally, Plaintiff's Exhibits 7 and 8 are lists of directors and officers of First Healthcare and Hillhaven, respectively.<sup>3</sup> Of the twenty nine (29) directors and officers of First Healthcare, sixteen (16) are directors or officers of Hillhaven. Finally, Plaintiff's Exhibit 10 is a copy of a Nursing Home Professional Liability insurance policy including general liability issued to Hillhaven. First Healthcare is not mentioned in the policy.

Generally, a showing of 100% stock ownership by a parent corporation is not, by itself, sufficient evidence of control over a subsidiary. Luckett v. Bethlehem Steel Corp., 618 F.2d 1373

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<sup>2</sup>NME Properties was formerly Hillhaven. However, no evidence is provided as to when the corporate metamorphosis occurred.

<sup>3</sup>Plaintiff's Exhibits 7 and 8 are not dated nor authenticated in any way.

(10th Cir. 1980). Neither is the fact the parent and subsidiary have common directors and officers sufficient to show control.

Controlling case law indicates advertising and insurance coverage including both the parent and subsidiary to be factors which may give rise to fact questions. *Id.* at 288. Coupled with the fact First Healthcare is a wholly-owned subsidiary of Hillhaven and both entities share common directors and officers, the Court concludes a question of fact exists as to the amount of control, if any, exercised over First Healthcare by Hillhaven. Thus, the Court DENIES Hillhaven's Motion for Summary Judgment.

IT IS SO ORDERED this 28<sup>th</sup> day of August, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA **F I L E D**

AUG 29 1996

STEVE ENRIQUEZ and  
CHERYL ENRIQUEZ,

Plaintiffs,

v.

BLUE CROSS AND BLUE SHIELD  
OF OKLAHOMA, Individually and  
as a trade name for  
GROUP HEALTH INSURANCE OF  
OKLAHOMA, INC., d/b/a  
BLUELINCS HMO,

Defendants.

Case No. 96-C-435-BU

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 30 1996

**DISMISSAL WITH PREJUDICE**

Upon the Joint Application To Dismiss with Prejudice filed by the parties herein, and for good cause shown,

**IS IS HEREBY ORDERED** that the above-captioned matter is hereby dismissed with prejudice.

**IT IS FURTHER HEREBY ORDERED** that, except as otherwise provided by agreement between the parties, all parties are to bear their own costs and attorneys' fees incurred herein.

DATED this 29<sup>th</sup> day of Aug, 1996.

OF MICHAEL BURRAGE

**The Honorable Michael Burrage  
UNITED STATES DISTRICT JUDGE**

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

IT-TULSA HOLDINGS, INC.,

Plaintiff,

v.

BIG FOUR FOUNDRIES CORP.,  
an Oklahoma corporation,  
and TULSA-SAPULPA UNION  
RAILWAY CO., an Oklahoma  
corporation,

Defendants.

Case No. 94-CV-498-K

FILED

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JOINT STIPULATION OF  
DISMISSAL WITH PREJUDICE

Plaintiff IT-Tulsa Holdings, Inc. ("IT-Tulsa"), and Defendant Big Four Foundries Corp. ("Big Four") hereby stipulate to the joint and mutual dismissal of all claims and counterclaims stated in the above-captioned action with prejudice, except to the extent reserved below, pursuant to Rule 41(a)(1), Fed. R. Civ. P. In support of this stipulation, Plaintiff and Defendant state:

1. Plaintiff and Defendant have resolved the claims between them in a mutually agreed settlement and, with the execution and filing of this stipulation and dismissal, have performed the terms of said agreement;

2. Plaintiff and Defendant hereby mutually release and forever discharge each and the other and their respective affiliates, and their officers, shareholders, agents and employees from any and all claims, demands, rights, and causes of action arising from or relating to the contamination complained of by Plaintiff in its Complaint filed herein, as is described more


particularly in the May 21, 1992 "Environmental Site Assessment of the IT-McGill Facility" report prepared by Terracon Environmental, Inc., and in the September 28, 1995 "IT-McGill Facility Phase II Environmental Assessment" prepared by Enercon Services, Inc., copies of which are in the possession of both Parties. This mutual dismissal, release and discharge does not preclude the Parties from subsequently asserting, and is without prejudice to, claims, demands, rights, causes of action, or any defenses thereto (1) relating to liabilities created by subsequent changes in laws or regulations applicable to such contamination, or (2) relating to subsequently discovered contamination on Plaintiff's property (located within the southwest quarter of Section 5, Township 18 North, Range 12 East, Creek County, Oklahoma, otherwise described as 5800 West 68th Street, Tulsa, Oklahoma).

3. This stipulation shall not constitute a finding or determination of liability on the part of either Party hereto.

4. Each party shall bear its own costs and attorneys' fees.


Dated: July 8th, 1996.

BIG FOUR FOUNDRIES CORP.

By:   
David C. Coman, President

Dated: July 16th, 1996.

DOERNER, SAUNDERS, DANIEL  
& ANDERSON

By:   
Linda C. Martin, OBA # 5732  
Russell W. Kroll, OBA # 15281  
320 S. Boston, Suite 500  
Tulsa, OK 74103  
(918) 582-1211

ATTORNEYS FOR BIG FOUR FOUNDRIES  
CORP.

Dated: July 12, 1996.

IT-TULSA HOLDINGS, INC.

By: \_\_\_\_\_

FRANK C. RICE  
Its \_\_\_\_\_ VICE PRESIDENT

Dated: July 15, 1996.

SHIPLEY, JENNINGS & CHAMPLIN

By: \_\_\_\_\_

Mark B. Jennings, OBA NO. 10082  
3600 First National Tower  
15 East Fifth Street  
Tulsa, Oklahoma 74103-4307  
(918) 582-1720

ATTORNEYS FOR IT-TULSA HOLDINGS,  
INC.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE AUG 28 1996

LISA CHRISTIANSON,

Plaintiff,

vs.

LARRY and CATHY ARMER,

Defendants.

No. 95-C-1140-K

**FILED**  
AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 27 day of August, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT O. VARNER; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; BANCFIRST fka  
FIRST BANK & TRUST; BANCFIRST  
fka BANK OF GLENPOOL; CITY OF  
GLENPOOL, Oklahoma; COUNTY  
TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE AUG 29 1996

**FILED**

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Civil Case No. 96-C 69K

**ORDER**

Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development of Washington, D.C., by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that the Judgment of Foreclosure filed July 24, 1996 be vacated and that this action shall be dismissed without prejudice.

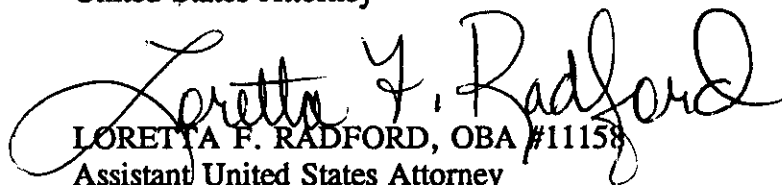
Dated this 27 day of August, 1996.

  
UNITED STATES DISTRICT JUDGE

15

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large, looping "L" and "R".

LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

333 W. 4th St., Ste. 3460

Tulsa, Oklahoma 74103

(918) 581-7463

LFR/esf

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 28 1996

FREDA CUNNINGHAM,

Plaintiff,

v.

BUSINESS MEN'S ASSURANCE CO. OF  
AMERICA,

Defendant.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No. 96-CV-155-K

ENTERED ON DOCKET  
AUG 28 1996

**ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN  
ORDER OF DISMISSAL WITH PREJUDICE**

For good cause having been shown, the parties, Plaintiff, Freda Cunningham, and Defendant, Business Men's Assurance Company of America, by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiff's Complaint, it is hereby ordered that the above-captioned action be dismissed with prejudice.

DATED this 27 day of August, 1996.

**s/ TERRY C. KERN**

UNITED STATES DISTRICT COURT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED  
AUG 28 1996

HALLET MOOMEY,

Plaintiff,

vs.

No. 95-CV-997-B

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

OTTAWA COUNTY SHERIFF'S DEPARTMENT,

JAMES EDWARD WALKER, and DUANE G.

KOEHLER,

Defendants.

ENTERED ON DOCKET

DATE AUG 29 1996

ORDER

On August 9, 1996, the Court informed Plaintiff that this action would be dismissed for lack of prosecution unless he filed a response to the Special Report within eleven days. Plaintiff has failed to do so.

Accordingly, this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED, this 28<sup>th</sup> day of Aug, 1996.



THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CHRIS FULTZ AND BOB FULTZ,

Plaintiff,

vs.

TERRANCE CHRISTOPHER BANKS,

Defendant,

and

STATE FARM INSURANCE COMPANIES,

Garnishee.

Case No. 95-C-1221-B ✓

ENTERED ON DOCKET

DATE AUG 29 1996 ✓

ORDER

The Court has for consideration Garnishee State Farm Insurance Company's ("State Farm") motion for summary judgment. (Docket # 22). Further, the Court considers Plaintiffs Chris Fultz and Bob Fultz's ("Plaintiffs") motion in limine. (Docket # 21). After a careful review of the record, the Court hereby GRANTS in part and DENIES in part State Farm's motion for summary judgment. The Court DENIES Plaintiffs' motion in limine.

INTRODUCTION

On July 30, 1994, Defendant Terrance Banks ("Terrance Banks") was driving an automobile owned by Raymond and Algerita Brooks ("Brooks") and insured by Garnishee State Farm. An accident occurred involving the Brooks vehicle, driven by Banks, and a vehicle owned by Plaintiff Chris Fultz. Plaintiff Bob Fultz was a passenger in the Chris Fultz vehicle, which was driven by Carl Brewer.

Plaintiffs Chris and/or Bob Fultz contacted State Farm seeking compensation under the

Brooks' vehicle liability insurance coverage for personal injuries and property damage. State Farm denied liability stating Terrance Banks was not a permissive user of the Brooks' vehicle, and therefore, not covered under the terms of the Brooks' policy.

Plaintiffs Chris and Bob Fultz initiated a civil action against Terrance Banks for personal injuries in the District Court in and for Tulsa County. Despite being properly served, Terrance Banks failed to contest the action. On September 13, 1995, District Judge Ronald Shaffer signed a Journal Entry of Judgment in favor of Plaintiffs Chris and Bob Fultz, awarding them a default judgment against Banks in the amount of \$118,500. Plaintiffs initiated post-judgment garnishment proceedings against State Farm in mid-November 1995 in Tulsa County District Court. On December 15, 1995, State Farm removed the action to this Court.

### UNCONTROVERTED FACTS

1. On July 30, 1994 at approximately 5:50 p.m., Terrance Banks was driving a 1987 Mitsubishi Montero Sport Wagon when a collision occurred with Plaintiffs' vehicle. (State Farm's Brief, Exhibit A).

2. On September 13, 1995, Plaintiffs obtained a default judgment in the amount of \$118,500 against Terrance Banks. (State Farm's Brief, Exhibit B).

3. On November 17, 1995, State Farm Mutual Automobile Insurance Company was served with a Garnishment Summons, claiming State Farm was indebted to Terrance Banks in the amount of \$118,500. (State Farm's Brief, Exhibit C).

4. The parties have stipulated Raymond and Algerita Brooks were the named insureds under a State Farm Mutual Automobile Insurance Company policy number 277 8418-36A ("the policy"), the policy was in effect on the day of the accident, and Terrance Banks was the driver of the

automobile at the time of the accident. (State Farm's Brief, Exhibit D). The policy provided for \$25,000.00/\$50,000.00 liability limits.

5. The policy defines "your car" as the car described on the declarations page. The declarations page for the policy of insurance lists the Mitsubishi Montero in question. (State Farm's Brief, Exhibit E, Declarations page).

6. The policy defines a "relative" as a "person related to you or your spouse by blood, marriage or adoption who lives with you. It includes your unmarried and unemancipated child away at school." (State Farm's Brief, Exhibit F).

7. The policy defines "you" or "your" as "the name insured or named insureds shown on the declarations page." Both Raymond and Algerita Brooks are named insureds on the declarations page at issue. (State Farm's Brief, Exhibits E, F).

8. According to Section I - Liability - Coverage A, the policy provides the following omnibus clause:

We will:

1. Pay damages which an insured becomes legally liable to pay because of:
  - a. bodily injury to others and;
  - b. damage to or destruction of property including loss of its use, caused by accident resulting from the ownership, maintenance or use of your car...

(State Farm's Brief, Exhibit F).

9. Section I - Liability - Coverage A also provides, under the section titled "Who Is An Insured," as follows:

When we refer to your car, a newly acquired car or a temporary substitute car, insured means:

1. you;
2. your spouse;

3. the relatives of the first person named in the declarations;
4. any other person while using such a car if its use is within the scope of consent of you or your spouse; and
5. any other person or organization liable for the use of such a car by one of the above insureds.

(State Farm's Brief, Exhibit F).

10. Algerita Brooks was deposed on May 16, 1996. She indicated the Mitsubishi Montero in question was her son's car, but it was in her and her husband Raymond Brooks' possession prior to the subject accident. Raymond and Algerita Brooks had bought the subject car for their son, Tony Brooks, and he left it in their possession while he was living out of state. (State Farm's Brief, Exhibit G, p. 5, lines 6-15).

11. On the day of the accident, Raymond and Algerita Brooks had let Algerita's sister, Mercedes Thompson, use the vehicle so that she could get back and forth to work. (State Farm's Brief, Exhibit G, p. 13, lines 14-19).

12. The loan of the vehicle was pursuant to an oral agreement between Algerita Brooks and her sister, Mercedes Thompson. Both Raymond and Algerita Brooks agreed to let Mercedes Thompson use the vehicle. (State Farm's Brief, Exhibit G, p. 16, lines 2-5).

13. Algerita Brooks did not have any objection to Mercedes Thompson's son, Damian Penny, driving the vehicle for the purpose of taking his mother to and from work. (State Farm's Brief, Exhibit G, p. 16, lines 16-25, p. 17, lines 1-3).

14. Algerita Brooks did not have any reason to specifically tell her sister not to let Terrance Banks drive the vehicle, because as far as Algerita Brooks knew, Terrance Banks was not even in town. (State Farm's Brief, Exhibit G, p. 20).

15. On the day of the accident, Terrance Banks obtained keys to the vehicle from Mercedes

Thompson's son, Damian Penny. (State Farm's Brief, Exhibit G, p. 21, lines 19-25).

16. On the day of the accident, only Algerita and Raymond Brooks were living at their residence on North Frankfort. (State Farm's Brief, Exhibit G, p. 7, lines 5-14).

17. Mercedes Thompson claims no knowledge that Terrance Banks had the vehicle. Terrance Banks told Algerita Brooks he had his own insurance at the time of the accident, and Algerita Brooks told her insurance agent she had not given permission to Terrance Banks to drive the vehicle, and that Terrance Banks had his own insurance. (State Farm's Brief, Exhibit G, p.23, lines 13-16, p. 24, lines 21-24).

18. Terrance Banks never lived with Algerita or Raymond Brooks. (State Farm's Brief, Exhibit G, p. 26, lines 5-6).

19. Raymond Brooks objected to Terrance Banks using this vehicle. (State Farm's Brief, Exhibit G, p. 28, lines 7-15).

20. Based upon State Farm's investigation of the accident, State Farm declined to extend coverage to Terrance Banks, or to pay policy proceeds to Plaintiffs herein, claiming Terrance Banks was a non-permissive user of the vehicle. (State Farm's Brief, Exhibit H).

21. State Farm had no notice of the lawsuit filed by Plaintiffs in the District Court in and for Tulsa County, and State Farm had no ability to control the lawsuit. (State Farm's Supplemental Affidavit of James Hoffman).

### SUMMARY JUDGMENT STANDARD

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

"The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

"Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . .

"A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521."

## LEGAL ANALYSIS

### **A. Tulsa County District Court Proceedings**

Plaintiffs seek to partially satisfy a \$118,500 default judgment against Terrance Banks by garnishing insurance proceeds from a policy issued by State Farm to Raymond and Algerita Brooks. State Farm contends it is not bound by the default judgment entered against Terrance Banks in Tulsa County District Court because they did not receive notice of the proceedings and was not given the option or opportunity to appear and defend against the claims.

"Garnishment proceedings are distinct from the underlying action, although the liability established in the underlying action is a prerequisite to proceeding against an insurer by garnishment." Hildebrand v. Gray, 866 P.2d 447, 449 (Okla. 1993). Plaintiffs claim the default judgment established liability, thus, enabling them to proceed with the instant garnishment action against State Farm. The Court agrees the default judgment established the legal liability of the defendant Terrance Banks. However, controlling case law does not support Plaintiffs' contention liability was established against State Farm by the default judgment.

In Bill Hodges Truck Co. v. Kaw Drilling Co., 465 P.2d 757 (Okla. 1970), the Oklahoma Supreme Court stated:

In our opinion, it is elementary that jurisdiction to control money, or an interest or potential interest, therein, belonging to an ostensible stranger to a judgment, can never be obtained in garnishment proceedings, instituted *after* the judgment, before it has been judicially determined that such party is, or should have been, a judgment debtor under the judgment. To hold otherwise, and to allow a garnisher to bring into judicial custody the property of such a stranger, by the simple device of writing its name into garnishment affidavits and summonses in such a way as to make it appear that such party had been a "defendant" in the action in which the judgment was entered, would make a mockery of due process, defeat the ends of justice, encourage sharp practice, and result in chaos.

In order for State Farm to be bound by the result of the Tulsa County District Court litigation,



State Farm must have received notice of such litigation and an opportunity to control the defense. See Henderson v. Eaves, 516 P.2d 270 (Okla. 1970). Plaintiffs attempt to prove State Farm had notice of the Tulsa County District Court litigation via the Affidavit of Mr. Bob Fultz which states, *inter alia*:

2. Following the automobile accident with Terrance Christopher Banks, I submitted a claim to State Farm Insurance Company for personal injuries and property damages.

3. In addition to the correspondence submitted to State Farm, I had telephone conversations with its representative. During the last telephone conversation, I advised the State Farm representative that if settlement failed, legal proceedings would be initiated. The last telephone conversation occurred within sixty days of initiating legal proceedings in State Court.

Affidavit of Plaintiff Bob Fultz, Pl.'s Reply to Garnishee's Response to Pl's motion in limine.

Further, on or about June 26, 1995, State Farm received a letter from Plaintiff Bob Fultz informing State Farm of his intent to litigate should a settlement not be reached. However, State Farm affirms they did not receive further correspondence or communication concerning the matter until they were served with a post judgment Garnishment Summons in mid-November, 1995. Affidavit of James D. Hoffman, Garnishee's Brief, Exhibit I. It is apparent State Farm had decided to deny coverage before the Tulsa County litigation began because Banks was not a permissive user of the subject vehicle. Id.

The Court FINDS State Farm did not receive proper notice of the Tulsa County District Court action. Therefore, State Farm is not bound by the default judgment entered against Terrance Banks in Tulsa County District Court. Hildebrand v. Gray, 866 P.2d 447 (Okla. 1993); General Supply v. Pinnacle Drilling, 806 P.2d 71 (Okla. 1991). The Court hereby GRANTS State Farm's motion for summary judgment on the issue of whether State Farm is bound by the Tulsa County

District Court judgment against Terrance Banks.

**B. Permissive Use of the Mitsubishi Montero**

State Farm claims it is entitled to summary judgment on the issue of whether Terrance Banks was a permissive user of the Brooks' automobile. If Terrance Banks was not a permissive user of the Mitsubishi Montero, as State Farm contends, the State Farm policy owned by the Brooks does not provide liability coverage for any damages arising from the vehicle collision between Plaintiffs and Terrance Banks. State Farm argues Raymond and/or Algerita Brooks strictly limited the purpose of loaning the Mitsubishi Montero to Mercedes Thompson to getting her to and from work and Mercedes Thompson knew of such restriction. It is not clear from the record whether such is the case.<sup>1</sup>

Mercedes Thompson testified in her deposition she did not drive vehicles with a stick shift, i.e. a standard transmission. The Mitsubishi Montero had a stick shift. It appears from the record the Brooks were aware of Mercedes Thompson's inability to drive vehicles with a stick shift. Plaintiffs' Brief, Exhibit C(2), lines 2-13. It is also apparent from the record Algerita Brooks did not object to Mercedes Thompson's son, Damian Penny, driving the subject vehicle for the purpose of taking his mother to work. State Farm's Brief, Exhibit G, p. 16, line 16 through p. 17, line 3. The record indicates the Brooks did not give Terrance Banks express permission to drive the Mitsubishi Montero.

The Court is of the opinion a fact question exists as to whether the Brooks impliedly gave permission to any other licensed driver to transport Mercedes Thompson to and from work. As the

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<sup>1</sup>It appears Mercedes Thompson used, or asked a relative to use, the Mitsubishi Montero to run personal errands such as going to the store to get bread. Plaintiffs' Brief, Exhibit C(3) & C(4) line 18 through Exhibit C(4)(sic) line 19.

Brooks knew of Mercedes Thompson's inability to drive vehicles with a stick shift, it is reasonable to conclude the Brooks, perhaps by implication, gave permission to drive the Mitsubishi Montero to another person for the purpose of taking Mercedes Thompson to and from work or to run errands for her. On the day of the accident, Terrance Banks was driving the Mitsubishi Montero and Damian Penny was a passenger. The accident occurred about 5:50 p.m. near 15th and South Lewis. Mercedes Thompson testified she was picked up from work that day by Damian Penny and Terrance Banks in the automobile between 6:00 p.m. and 7:00 p.m.

The Court is of the opinion a fact question exists as to what Terrance Banks and Damian Penny were doing at approximately 5:50 p.m. on July 30, 1994.<sup>2</sup> Further, the Court concludes a fact question of who had implied permission to drive the subject automobile exists. The Court **DENIES** State Farm's motion for summary judgment on the issue of permissive use of the Mitsubishi Montero by Terrance Banks.

### **C. Plaintiff's Motion in Limine**

Consistent with the Court's rulings herein, Plaintiff's motion in limine seeking the Court to limit the evidence in the trial of this matter to the issue of whether Banks was a permissive user of the Brooks' insured vehicle is hereby **DENIED**. Thus, discovery may include evidence concerning Plaintiffs' alleged damages.

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<sup>2</sup>Algerita Brooks testified, in part, as follows:

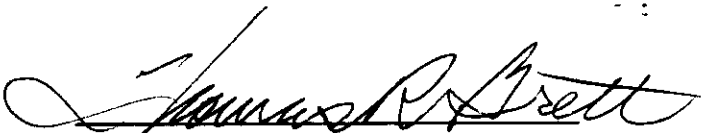
Q: (By Mr. Madison) Did he (Terrance Banks) give you any specifics as to where he was going or where he had been either before or after the accident?

A: No.

### CONCLUSION

The Court GRANTS State Farm's motion for summary judgment on the issue of whether State Farm is bound by the Tulsa County District Court judgment against Terrance Banks. The Court DENIES State Farm's motion for summary judgment on the issue of whether Terrance Banks was a permissive user of the Brooks' vehicle. The Court DENIES Plaintiffs' motion in limine seeking to limit trial evidence to the issue of whether Terrance Banks was a permissive user of the Brooks' vehicle.

IT IS SO ORDERED this 28<sup>th</sup> day of August, 1996.

  
THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

KATHY KEIM

Plaintiff,

v.

Case No. 96-C-0016-BU ✓

ROCKY BEVARD, TIM SHIVELY,  
CITY OF BARTLESVILLE, OKLAHOMA,  
CITY OF COFFEYVILLE, KANSAS,  
BARTLESVILLE POLICE OFFICERS  
JOHN DOE, et al, COFFEYVILLE  
POLICE OFFICERS RICHARD ROE,  
et al,

Defendants.

FILED

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DISMISSAL WITH PREJUDICE

COME NOW the Plaintiff, Kathy Keim, and hereby dismisses the  
above case with prejudice.

  
KATHY KEIM, PLAINTIFF

NIX & RINN

By: 

JEFF NIX, ESQ.

2121 S. Columbia

Suite 710

Tulsa, Oklahoma 74114-3521

ATTORNEYS FOR PLAINTIFF

Dismissal stipulated to by the  
Defendants

By: 

John H. Lieber, OBA# 5421

2727 E. 21st Street, Suite 200

Tulsa, OK 74114

(918) 747-8900

Attorneys for Defendants

3.MAG\KEIM\Dismissa

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE 8-29-96

FRED SPARKS,

Plaintiff,

vs.

CONTROLLED WASTE, INC.,  
a corporation, and BARRY  
SIMPSON,

Defendants.

Case No. 95-C-1009H-HOLMES

**F I L E D**

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

STIPULATED MUTUAL DISMISSAL

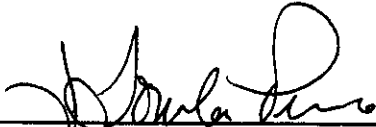
COMES NOW Plaintiff, Fred Sparks, and Defendants, Barry Simpson and Controlled Waste, Inc., by its President, Barry Simpson, and hereby dismiss with prejudice the claims and causes of action herein variously asserted against the other(s) and further ask the Court to dismiss this action with prejudice to refiling.


  
FRED SPARKS, PLAINTIFF

 Pres  
CONTROLLED WASTE, INC., DEFENDANT

  
BARRY SIMPSON, DEFENDANT

APPROVED AS TO FORM:

  
J. TOWNLEY PRICE, ESQ., OBA #  
1700 Southwest Blvd., Suite 100  
P.O. Box 799  
Tulsa, OK 74101-0799  
ATTORNEYS FOR PLAINTIFF  
FRED SPARKS

  
JOHN W. HUNT, ESQ., OBA #4491  
MICHAEL STAGGS, ESQ., OBA #13782  
HOWARD & WIDDOWS, P.C.  
2021 South Lewis, Ste. 470  
Tulsa, OK 74104  
(918) 744-7440  
ATTORNEYS FOR CONTROLLED WASTE, INC.  
AND BARRY SIMPSON

FILED

AUG 28 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RODNEY BLACK and NONA BLACK,  
individually and d/b/a BLACK  
CONSTRUCTION COMPANY, a  
partnership,

Plaintiff,

vs.

A-1 TELEPHONE INSTALLATION  
INC.; CONOCO INC.; OKLAHOMA  
COMMUNICATION SYSTEMS, INC.;  
and CONOCO PIPELINE COMPANY,

Defendants.


ENTERED ON DOCKET

DATE 8-29-96

Case No. 96CV-575E

DISMISSAL WITHOUT PREJUDICE

Comes now Rodney Black and Nona Black, individually, and d/b/a Black Construction Company, a partnership, and dismisses without prejudice their respective action against Conoco, Inc.

  
BRUCE W. GAMBILL, OBA #3222  
Gambill & Associates  
P.O. Box 329  
Pawhuska, Oklahoma 74056  
918-287-4185  
Attorney for Plaintiff

CERTIFICATE OF MAILING

I certify a true and correct copy of the above and foregoing Dismissal Without Prejudice was duly mailed this 28 day of August, 1996, to:

John R. Paul, Richards, Paul & Richards, Attorney for Oklahoma Communication Systems, Inc., 9 East 4th Street, Suite 400, Tulsa, Oklahoma 74103-5118;

Gary Davis, Crowe & Dunlevy, Attorney for Conoco, Inc. and Conoco Pipeline Company, 1800 Mid-America Tower, Oklahoma City, Oklahoma 73102;

K. Clark Phipps, Atkinson, Haskins, Nellis, Boudreaux, Holeman, Phipps & Brittingham, Attorney for A-1 Telephone Installation, Inc., 1500 Parkcentre, 525 South Main, Tulsa, Oklahoma 74103-4524; and

Harlan S. Pinkerton, P.O. Box 470690, Tulsa, Oklahoma 74147,  
with proper postage fully prepaid thereon.

  
\_\_\_\_\_  
BRUCE W. GAMBILL



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

FEDERAL DEPOSIT INSURANCE  
CORPORATION, in its Corporate  
Capacity,

Plaintiff,

vs.

DELBERT D. KYLER, a/k/a  
DELBERT DEAN KYLER, a/k/a  
D.D. KYLER, a/k/a DELBERT  
KYLER and MARILYN KYLER,  
a/k/a MARILYN KAY FRANCES  
KYLER, husband and wife;  
et al.,

Defendants.

Case No. 96-C-96-BU

AUG 27 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

AUG 28 1996


DATE

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 27<sup>th</sup> day of August, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 27 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

CIDNEY GARCIA,

Plaintiff,

v.

SHIRLEY S. CHATER,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

Case No. 95-C-448-K

FILED ON DOCKET  
DATE AUG 28 1996

**REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE**

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(l) and 223 and supplemental security income under §§ 1602 and 1614(a)(3)(A) of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the United States Administrative Law Judge Ralph L. Wampler (the "ALJ"), which summaries are incorporated herein by reference.

---

<sup>1</sup>Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.<sup>2</sup>

In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.<sup>3</sup> He found that claimant had the residual functional capacity to perform the physical exertional requirements of work, except for lifting more than ten pounds occasionally. He concluded that the claimant was unable to perform her past relevant work as a commercial artist and garment worker, but had the residual

---

<sup>2</sup>Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v. Mathews, 574 F.2d 359 (6th Cir. 1978).

<sup>3</sup>The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

functional capacity to perform the full range of sedentary work. He found that the claimant was 41 years old, which is defined as a younger individual, had a high school education, and had acquired work skills, such as skilled handwork, which she demonstrated in past work. He concluded that, considering her residual functional capacity, these skills could be applied to meet the requirement of semi-skilled work activities of other work which existed in significant numbers in the national economy, such as hand fur cleaner, leather sprayer, hatter, embroider, cashier, and assembly jobs. Having determined that the claimant was able to do sedentary work, the ALJ concluded that she was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts alleged errors by the ALJ:

- (1) The ALJ erred in not finding that claimant was disabled per se under Listing § 1.03(B) of the Listing of Impairments.
- (2) The ALJ erred in discounting claimant's complaint of disabling pain.

It is well settled that the claimant bears the burden of proving disability that prevents any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant contends that she has been unable to work because of the residuals of surgical correction of bilateral club feet when she was young (TR 84). She had surgeries at ages seven, eleven, and sixteen, but worked in spite of the condition for years, until December 1, 1991 (TR 84, 294-295).

There are few medical records in evidence. On September 30, 1992, claimant

was examined by Dr. L.W. Ghormley, who described claimant's feet as follows:

The left foot is essentially normal in appearance. Dorsal and medial scars are present on the foot. Plantar flexion occurs to 40° but dorsiflexion only to 0°. There is a large scar on the posterior aspect of the left calf, the site of the donation of a pedicle cross flap to the right foot. The muscles of the left leg are markedly under-developed giving a bird-like "toothpick" appearance to the leg. The right foot is markedly under-developed and the right ankle is frozen in 20° of plantar flexion. The patient walks on the ball of the foot and toes and thick calluses are present on the plantar surface of the forefoot and on the lateral aspect of the foot. A cross pedicle flap covers the dorsum of the right ankle joint and the upper midfoot. The right big toe is in moderate hallux valgus deformity and the interphalangeal joint is ankylosed in 45° of flexion. There is complete loss of inversion and eversion in the right foot. Once again the muscles of the right leg are markedly under-developed giving a bird-like "toothpick" appearance to the right leg, identical to the left leg.

(TR 115).

Dr. Ghormley found that she had no other joint tenderness, redness, swelling, heat, or severe tenderness (TR 116). "Gait is definitely impaired as to speed but there is reasonable stability and safety. The patient does not at this time require an assistive device such as a cane but she states that she uses crutches when her calluses become too sore on the right foot to permit weight bearing." (TR 116).

On December 30, 1992, claimant was evaluated by Dr. Robert Eyster, who stated:

The patient's examination reveals callouses on the right foot, inability to move the foot, sensation loss, decreased popliteal and dorsalis pedis pulses, and decreased dorsiflexion with fixed deformity at about fifteen degrees of plantar flexion. The patient has good knee movement, but there [is] atrophy of the lower leg. The left leg is atrophic but there are dorsiflexion capabilities and no real fixed deformities. X-rays show a staple in the left heel, and a staple in the right subtalar joint.

I believe that this patient is a candidate for a BK amputation on the right.  
I feel this decision should be hers, it is just an option.

(TR 157).

On April 20, 1993, Dr. Evans examined claimant's right foot and stated: "[s]he has multiple scars about the right foot. There is full thickness skin graft over the dorsum of the foot. She has only about a total of 20 degrees of motion in the foot and ankle area. Her foot is in a position of mild equinus and inversion. She has severe callouses over the plantar aspect of the foot." (TR 156). He found that x-rays showed "severe degenerative change at the ankle joint with retained staples." (TR 156). Dr. Evans suggested an ankle fusion, bringing the foot up into a corrected position, but claimant was not interested in any surgery unless there was a good chance of complete success. (TR 156).

A year later on April 27, 1994, claimant was seen at Orthopedic Specialists of Tulsa, Inc., and the doctor reported that x-rays revealed "a fused, somewhat deformed and shortened foot." (TR 184). The doctor found that she had arthritis of the tib talar joint, but there was slight motion. (TR 184). The doctor noted that she had less motion prior to a fall, but had obtained a more plantigrade gait after falling. (TR 184). The doctor did not recommend amputation of the foot, but gave her a gel to control a skin rash on it (TR 184).

Much of the record consists of diary pages where claimant discusses her foot problems and activities (TR 119-151, 188-284). At hearings on July 22, 1993 and August 30, 1994, she testified that she cannot work because pain makes

concentration difficult and she has trouble walking, standing, and sitting (TR 293, 304-308). She claimed that she could not afford to go to a doctor to get pain medication, and over-the-counter medications are not effective (TR 306). In her disability application, she stated that she cleans her house once a week, cooks, draws, visits with friends and neighbors, and drives short distances (TR 87).

There is no merit to claimant's contentions. The ALJ did not err in finding that claimant was not medically disabled per se under the criteria of § 1.03(B) of the Listing of Impairments, Appendix 1, 20 C.F.R. Part 404, Subpart P:

Arthritis of a major weight bearing joint (due to any cause):  
With history of persistent pain and stiffness with signs of marked limitation of motion or abnormal motion of the affected joint on current physical examination.

With: . . .

B. Reconstructive surgery or surgical arthrodesis of a major weight-bearing joint and return to full weight-bearing status did not occur, or is not expected to occur, within 12 months of onset.

Claimant had reconstructive surgery on her ankle several times, but she was able to work and bear weight on the ball of her right foot and left foot for years after surgery (TR 84, 294-295). On September 29, 1992, her doctor reported that her gait was slow, but reasonably stable and safe (TR 116). No physician ever reported that she was disabled or unable to work.

Courts have found that persons with leg ailments are nevertheless able to work. Johnson v. Sullivan, 929 F.2d 596 (11th Cir. 1991) (leg amputated); Rhoderick v. Heckler, 737 F.2d 714, 715-16 (7th Cir. 1984) (bad knee). The Tenth

Circuit in Johnson v. Finch, 437 F.2d 1321, 1323 (10th Cir. 1971), concluded that a claimant who had a congenital bilateral clubfoot deformity could engage in sedentary work.

There is also no merit to claimant's contention that the ALJ erred in failing to find that her complaints of disabling pain were not credible. Pain, even if not disabling, is a nonexertional impairment to be taken into consideration, unless there is substantial evidence for the ALJ to find that the claimant's pain is insignificant. Thompson v. Sullivan, 987 F.2d 1482 (10th Cir. 1993). Both physical and mental impairments can support a disability claim based on pain. Turner v. Heckler, 754 F.2d 326, 330 (10th Cir. 1985). However, the Tenth Circuit has said that "subjective complaints of pain must be accompanied by medical evidence and may be disregarded if unsupported by any clinical findings." Frey v. Bowen, 816 F.2d 508, 515 (10th Cir. 1987). The court in Luna v. Bowen, 834 F.2d 161, 165-66 (10th Cir. 1987), discussed what a claimant must show to prove a claim of disabling pain:

[W]e have recognized numerous factors in addition to medical test results that agency decision makers should consider when determining the credibility of subjective claims of pain greater than that usually associated with a particular impairment. For example, we have noted a claimant's persistent attempts to find relief for his pain and his willingness to try any treatment prescribed, regular use of crutches or a cane, regular contact with a doctor, and the possibility that psychological disorders combine with physical problems. The Secretary has also noted several factors for consideration including the claimant's daily activities, and the dosage, effectiveness, and side effects of medication. Of course no such list can be exhaustive. The point is, however, that expanding the decision maker's inquiry beyond objective medical evidence does not result in a pure credibility determination. The decision maker has a good deal more than the appearance of the claimant to use in determining whether the claimant's pain is so severe



as to be disabling. (Citations omitted).

See also, Hargis v. Sullivan, 945 F.2d 1482, 1489 (10th Cir. 1991).

Pain must interfere with the ability to work. Ray v. Bowen, 865 F.2d 222, 225 (10th Cir. 1989). A claimant is not required to produce medical evidence proving the pain is inevitable. Frey, 816 F.2d at 515. She must establish only a loose nexus between the impairment and the pain alleged. Luna, 834 F.2d at 164. "[I]f an impairment is reasonably expected to produce some pain, allegations of disabling pain emanating from that impairment are sufficiently consistent to require consideration of all relevant evidence." Huston v. Bowen, 838 F.2d 1125, 1129 (10th Cir. 1988) (quoting Luna, 834 F.2d at 164).

Because there was some objective medical evidence to show that plaintiff had a foot problem producing pain, the ALJ was required to consider the assertions of severe pain and to "decide whether he believe[d them]." Luna, 834 F.2d at 163; 42 U.S.C. § 423(d)(5)(A). However, "the absence of an objective medical basis for the degree of severity of pain may affect the weight to be given to the claimant's subjective allegations of pain, but a lack of objective corroboration of the pain's severity cannot justify disregarding those allegations." Luna, 834 F.2d at 165. This court need not give absolute deference to the ALJ's conclusion on this matter. Frey, 816 at 517.

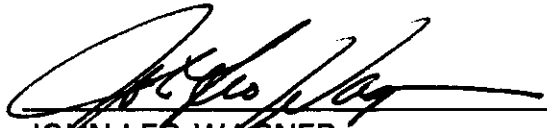
The ALJ properly concluded that claimant's subjective allegations of disabling pain were not credible because "[s]he takes no medication for her pain, and indicates that it would do no good, anyway, to take over-the-counter medication. But the

undersigned believes that if the claimant had severe pain she would seek active treatment, she would use prescriptive pain medication when required." (TR 18). The ALJ noted that she "chooses occasionally to go about on crutches," but Dr. Ghormley found that her gait was impaired as to speed, but there was no problem with stability and safety and she did not require an assistive device such as a cane. (TR 18). The ALJ noted that she had "no problem with her appetite, which is often an indicator of severe pain problem, and while she said she has some pain at night, she did not allege that she was unable to sleep or had any problems with her sleep patterns." (TR 19). He found nothing in the records that would indicate that her condition had worsened since 1991, the date she last worked, or that would indicate merely sitting would cause pain (TR 19).

Sedentary work is described in § 404.1567 of the social security requirements as work which involves "lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." The vocational expert testified that claimant could do many sedentary jobs that involve no walking or standing that exist in the national economy (TR 313-315). There is substantial evidence in the record that she can do such jobs.

The decision of the ALJ is supported by substantial evidence and is a correct application of the regulations. The decision should be affirmed.

Dated this 26<sup>th</sup> day of August, 1996

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:\orders\garcia

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 27 1996 *for*

FEDERAL DEPOSIT INSURANCE CORPORATION, )

Plaintiff, )

v. )

No. 93-C-123-H ✓

JOSEPH A. FRATES; THORN HUFFMAN; )

JOHN E. DEAS; DAVID L. FIST; )

C. MICHAEL BARKLEY and )

ROBERT WESTFIELD, )

Defendants. )

*EOD 8/28/96*

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ORDER

On August 21, 1996, the Court heard oral argument on the following motions:

(1) Oral motion of Defendants to require production of State Federal Savings and Loan Association ("State Federal") records in Tulsa; and (2) "Defendant Frates' Combined Motion for Continuance Under F.R.C.P., Rule 56(F), Alternative Motion for Extension of Time, and Brief in Support." [Doc. Nos. 187-1 and 187-2].

**I. Oral Motions to Produce**

State Federal's principle offices were located in Oklahoma. The Resolution Trust Corporation ("RTC") took over State Federal in February of 1990. When the RTC took over State Federal, the RTC packed up State Federal's business records and removed them from Oklahoma (i.e., to Wichita, Kansas and Eugene, Oregon).

Defendants were officers and directors of State Federal and they are accused of wrongful conduct during their tenure as officers and directors of State Federal. Defendants need access to State Federal's business records to prepare their defenses

in this case. The RTC and Defendants have worked, and continue to work, together to identify which of State Federal's business records are relevant to this litigation. The parties can not, however, agree as to where the RTC must produce the relevant State Federal documents

Defendants contacted the Court by phone and asked for the Court's assistance in determining where the relevant State Federal documents should be produced. Defendants want the documents produced in Tulsa, Oklahoma and Plaintiff is only willing to produce the documents in the office of its local counsel in Muskogee, Oklahoma. The Court set the matter for hearing and ordered that the parties file informal letters explaining their positions on this issue. At the hearing of this matter, the Court advised the parties that it would treat Defendants' request for assistance as an oral motion to produce the relevant State Federal records in Tulsa, Oklahoma and that the parties' letters<sup>1/</sup> would be placed in the Court file.

The Court has reviewed the parties' submissions on this issue and heard argument from the parties. For the reasons stated on the record at the hearing of this matter, the Court **GRANTS** Defendants' motion to produce all relevant State Federal records in Tulsa, Oklahoma. By September 13, 1996, the RTC shall produce the documents currently in Muskogee, Oklahoma for inspection by the Defendants in Tulsa, Oklahoma. All future State Federal records identified as relevant shall also be produced by the RTC for Defendants' inspection in Tulsa, Oklahoma.

---

<sup>1/</sup> The letters are both dated August 20, 1996. Defendants' is signed by John D. Clayman and is on Miller, Dollarhide, Dawson & Shaw letterhead. Plaintiff's is signed by Andrew G. Lewis and is on Hershner, Hunter, Andrews, Neill & Smith letterhead.

II. Defendant Frates' Rule 56(f) Motion [Doc. Nos. 187-1 & 187-2]

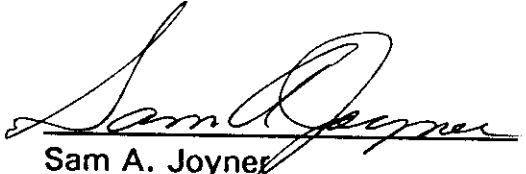
Plaintiff filed a motion for partial summary judgment against Defendant Frates with regard to the breach of contract and warranty claims in this lawsuit. [Doc. No. 178]. Defendant Frates has filed a motion seeking either a Rule 56(f) extension or a continuance due to the complexity of the issues involved. The Court has reviewed the parties' briefs and heard oral argument on this issue. The Court hereby **GRANTS** Defendant Frates' motion. Mr. Frates shall have until October 25, 1996 to respond to Plaintiff's motion for partial summary judgment. Plaintiff shall have until November 15, 1996 to reply to Mr. Frates' response to Plaintiff's motion for partial summary judgment.

III. Scheduling Order

On June 18, 1996, the Court entered a partial Scheduling Order in this case. [Doc. No. 191]. The parties have requested that certain deadlines set by the Scheduling Order be stricken or modified. In light of the fact that a significant issue in this lawsuit is presently before the United States Supreme Court and in light of the fact that Judge Sven Holmes stayed a case substantially similar to this (i.e., RTC v. Grant, 92-CV-1043-H), the Court hereby **GRANTS** the parties' request. All deadlines set by this Court's June 18th Order are stricken, with the exception of the dispositive motion deadline. The January 13, 1997 dispositive motion deadline is still in effect.

IT IS SO ORDERED.

Dated this 27 day of August 1996.

  
Sam A. Joyner  
United States Magistrate Judge

**FILED**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AUG 27 1996

*Ja*

PATRICK OSEI,

Plaintiff,

v.

KIMBERLY-CLARK CORPORATION,

Defendant.

Case No. 96-C-737-H ✓

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED CLERK

DATE 8-28-96

**ORDER**

This matter comes before the Court on Defendant's notice of removal.<sup>1</sup>

Plaintiff originally brought this action in the District Court for Tulsa County. Plaintiff's petition alleges one cause of action and claims damages "in excess of \$10,000.00, but not yet in excess of \$50,000" for this cause of action.<sup>2</sup> Defendant Kimberly-Clark filed a petition for removal stating that removal is proper on the basis of diversity jurisdiction.

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<sup>1</sup> In pertinent part, the statute governing "procedure for removal" states that:

[t]he United States district court in which [the notice for removal] is filed shall examine the notice promptly. If it clearly appears on the face of the notice and any exhibits annexed thereto that removal should not be permitted, the court shall make an order for summary remand.

If the United States district court does not order the summary remand of such prosecution, it shall order an evidentiary hearing to be held promptly and after such hearing shall make such disposition of the prosecution as justice shall require.

See also 28 U.S.C. § 1447(c) (procedure after removal) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

<sup>2</sup> In Oklahoma, the general rules of pleading require that:

[e]very pleading demanding relief for damages in money in excess of Ten Thousand Dollars (\$10,000.00) shall, without demanding any specific amount of money, set forth only that the amount sought as damages is in excess of Ten Thousand Dollars (\$10,000.00), except in actions sounding in contract.

Okla. Stat. Ann. tit. 12, § 2008(2) (West 1993).

4



This notice of removal is not the first one filed in this case. Defendant previously attempted to remove the case from state court on September 12, 1995, in Case No. 95-CV-910-BU. In that notice of removal, Defendant stated:

The amount in controversy in this action is reasonably believed by Kimberly-Clark to exceed the sum or value of \$50,000, exclusive of interest and costs, and is between citizens of different states. In the Petition, Plaintiff prays for actual damages in excess of \$10,000, "but not yet in excess of \$50,000." Plaintiff also prays for punitive damages in excess of \$10,000, "but not yet in excess of \$50,000." Because of the vagueness of Plaintiff's prayer, on August 31, 1995, Kimberly-Clark requested Plaintiff to admit that he was seeking total damages of less than \$50,000. A copy of Kimberly-Clark's August 31, 1995, request is attached hereto as Exh. 2. Plaintiff refused to admit that he seeks total damages of less than \$50,000, and instead caused further confusion. . . .

Based upon the information received by Kimberly-Clark to date, Kimberly-Clark in good faith believes the amount in controversy to exceed the sum of \$50,000, exclusive of interest and costs.

Def. Notice of Removal, Case No. 95-CV-910-BU, (filed Sept. 12, 1995) at 2. On October 16, 1995, Judge Michael Burrage entered an order remanding the case to state court, stating as follows:

In the instant case, Plaintiff in his petition has prayed for actual and punitive damages "in excess of \$10,000, but not yet in excess of \$50,000." Because the sum of damages claimed by Plaintiff controls and Defendant has failed to prove that such claim which does not exceed \$50,000 is not made in good faith and because Defendant has failed to set forth in its notice of removal underlying facts which support the assertion that the amount in controversy exceeds \$50,000, see, St. Paul Indemnity Co., 303 U.S. at 288-289 and Laughlin, 50 F.3d at 873, the Court finds that this case does not satisfy the \$50,000 jurisdictional amount requirement of 28 U.S.C. § 1332.

Patrick Osei v. Kimberly-Clark Corp., No. 95-CV-910-BU (N.D. Okla. Oct. 16, 1995).

Subsequently, Defendant filed an Unopposed Motion to Reopen and for Reconsideration based on the fact that Defendant failed to receive Plaintiff's Motion to Remand. Judge Burrage granted this motion, and Defendant filed a brief in opposition to Plaintiff's motion to remand. Defendant argued that reliance on Laughlin v. K-Mart Corp., 50 F.3d 871 (10th Cir. 1995), is misplaced because "[h]ere, unlike in Laughlin, the Notice specifically stated Defendant's good

faith belief that the amount in controversy exceeds \$50,000 exclusive of interest and costs.” Def. Br. in Opp. to Pl. Mot. to Remand at 4. Judge Burrage, however, found Defendant’s argument to be unavailing and once again ordered the case remanded to state court. In his order, Judge Burrage reaffirmed his reliance on Laughlin, stating as follows:

In order for a federal court to have original jurisdiction in a diversity case, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The amount in controversy is generally determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart Corporation, 50 F.3d 871, 873 (10th. Cir.), cert. denied, 116 S. Ct. 174 (1995). “The burden is on the party requesting removal to set forth, in the notice of removal itself, the ‘underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000.’” Id. (quoting Gaus v. Miles, Inc., 980 F.2d 564, 567 (9th Cir. 1992) (emphasis in original)). Furthermore there is a presumption against removal jurisdiction. Id.

In the instant case, Plaintiff’s Petition does not set forth allegations which establish the requisite jurisdictional amount. The Petition merely alleges actual damages “in excess of \$10,000, but not yet in excess of \$50,000” and punitive damages “in excess of \$10,000, but not yet in excess of \$50,000.” As a result, Defendant bears the burden of actually proving the facts to support the jurisdictional amount. Gaus, 980 F.2d at 566-67. Here, Defendant has offered no facts whatsoever to support the Court’s exercise of diversity jurisdiction. Defendant has simply alleged in the Notice of Removal that “the amount of controversy in this action is reasonably believed by [Defendant] to exceed the sum or value of \$50,000, exclusive of interest and costs” and “[Defendant] in good faith believes the amount of controversy to exceed the sum of \$50,000, exclusive of interest and costs.” These allegations do not, in the Court’s view, satisfy the Defendant’s burden of setting forth, in the removal petition itself, the underlying facts supporting its assertion that the amount in controversy exceeds \$50,000.

Patrick Osei v. Kimberly-Clark Corp., No. 95-CV-910-BU (N.D. Okla. Nov. 29, 1995) (emphasis added). Thus, Judge Burrage twice unequivocally rejected Defendant’s attempt to assert diversity jurisdiction without the necessary underlying facts supporting the alleged amount in controversy.

Defendant has again filed a notice of removal in this case. It appears that complete diversity of citizenship exists between the parties. Thus, the question again before the Court is whether the jurisdictional amount requirement has been satisfied under 28 U.S.C. § 1332(a).

#### I.

Initially, the Court notes that federal courts are courts of limited jurisdiction. Further,

[d]efendant's right to remove and plaintiff's right to choose his forum are not on equal footing; for example, unlike the rules applied when plaintiff has filed suit in federal court with a claim that, on its face, satisfies the jurisdictional amount, removal statutes are construed narrowly; where plaintiff and defendant clash about jurisdiction, uncertainties are resolved in favor of remand.

Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994).

In order for a federal court to have diversity jurisdiction, the amount in controversy must exceed \$50,000. 28 U.S.C. § 1332(a). The Tenth Circuit has clarified the analysis which a district court should undertake in determining whether an amount in controversy is greater than \$50,000. The Tenth Circuit stated:

[t]he amount in controversy is ordinarily determined by the allegations of the complaint, or, where they are not dispositive, by the allegations in the notice of removal. The burden is on the party requesting removal to set forth, in the notice of removal itself, the "underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." Moreover, there is a presumption against removal jurisdiction.

Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir.) (citations omitted), cert. denied, 116 S. Ct. 174 (1995); see Maxon v. Texaco Ref. & Mktg. Inc., 905 F. Supp. 976 (N.D. Okla. 1995) (following Laughlin and remanding); see also Martin v. Missouri Pac. R.R. Co., 1996 WL 435614 (N.D. Okla. 1996) (same); Hughes v. E-Z Serve Petroleum Mktg. Co., 1996 WL 434528 (N.D. Okla. 1996) (same).

In Laughlin, the plaintiff originally brought his action in state court. Defendant removed to federal court based on diversity jurisdiction. The court granted summary judgment to defendant, and plaintiff appealed. On appeal, the Tenth Circuit raised the issue of subject matter jurisdiction and remanded the case to state court. Neither the petition nor the notice of removal had established the requisite jurisdictional amount. The petition alleged that the amount in controversy was "in excess of \$10,000" for each of two claims. The notice of removal did not refer to an amount in controversy, but did contain a reference to the removal statute, 28 U.S.C. § 1441. In its brief on the issue of jurisdiction, Kmart set forth facts alleging that, at the time of

removal, the amount in controversy was well above the jurisdictional minimum of \$50,000.

However, Kmart failed to include those facts in its notice of removal.

The Tenth Circuit held that:

Kmart's economic analysis of Laughlin's claims for damages, prepared after the motion for removal and purporting to demonstrate the jurisdictional minimum, does not establish the existence of jurisdiction at the time the motion was made. Both the requisite amount in controversy and the existence of diversity must be affirmatively established on the face of either the petition or the removal notice.

Laughlin, 50 F.3d at 873.

In Laughlin, Kmart attempted to rely on Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993). The Shaw court held that "the plaintiff had conceded jurisdiction because he failed to contest removal when the motion was originally made, and because he stated in his opening appellate brief that the amount in controversy exceeded \$50,000." The Tenth Circuit distinguished Shaw, stating:

[w]e do not agree, however, that jurisdiction can be "conceded." Rather, we agree with the dissenting opinion that "subject matter jurisdiction is not a matter of equity or of conscience or of efficiency," but is a matter of the "lack of judicial power to decide a controversy."

Laughlin, 50 F.3d at 874 (citation omitted).

## II.

The Tenth Circuit's interpretation of 28 U.S.C. § 1441, the statute governing a party's removal of a lawsuit to federal court predicated on diversity jurisdiction, is in accord with the views of other federal courts. In a comprehensive, well-reasoned opinion, the Sixth Circuit held that, where the amount of damages in the lawsuit is not specified, the removing party bears the burden of proving by a preponderance of the evidence that the amount in controversy exceeds \$50,000. Gafford v. General Elec. Co., 997 F.2d 150, 157-60 (6th Cir. 1993); accord Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (where the complaint does not allege a specific amount of damages, the removing defendant must prove by a preponderance of the

evidence that the amount in controversy exceeds \$50,000); Shaw, 994 F.2d at 366 (adopting preponderance of the evidence standard; removing defendant must produce proof to a reasonable probability that jurisdiction exists); McCorkindale v. American Home Assurance Co./A.I.C., 909 F. Supp. 646, 653 (N.D. Iowa 1995) (same); cf. Burns, 31 F.3d at 1097 (where plaintiff alleges a specific claim for damages in an amount less than the jurisdictional amount, to establish removal jurisdiction, defendant must prove to a legal certainty that, if plaintiff were to prevail, she would not recover less than \$50,000).

In Gafford, a witness on behalf of the removing defendant, the Senior Counsel for Labor and Employment at the GE facility where Plaintiff was employed, testified at the pretrial hearing on jurisdiction that, if the Plaintiff were to prevail on her claims, she would be entitled to damages in an amount greater than \$50,000. Plaintiff did not present any evidence contradicting that testimony. Id. at 160-61. On that basis, the Sixth Circuit upheld the district court's finding of removal jurisdiction. Id. at 161.

The Gafford court noted that its holding (that the appropriate burden of proof born by the removing party is the preponderance of the evidence) comports with the views expressed by the United States Supreme Court in McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Quoting McNutt, the Gafford court stated:

[t]he authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in an appropriate manner, he must support them by competent proof. And where they are not so challenged the court may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of the evidence.

997 F.2d at 160.

To the extent that both Laughlin and Gafford represent the requirement that underlying facts be utilized by the removing party to satisfy its burden of proof, the Fifth Circuit is in accord. See Asociacion Nacional de Pescadores a Pequena Escala o Artesanales de Colombia (Anpac) v.

Dow Quimica de Colombia S.A., 988 F.2d 559, 566 (5th Cir. 1993), cert. denied, 114 S. Ct. 685 (1994). In Anpac, a group of Colombian fishermen sued a chemical manufacturer and its Colombian subsidiary in Texas state court for personal injuries such as "skin rashes" allegedly arising out of a pesticide spill. The complaint did not specify an amount of damages. Defendant Dow filed a notice of removal which stated simply that "the matter in controversy exceeds \$50,000 exclusive of interest and costs." Id. at 565. This conclusory statement did not establish that removal jurisdiction was proper. Id. The Fifth Circuit articulated its analysis in Allen, stating:

[f]irst, a court can determine that removal was proper if it is facially apparent that the claims are likely above \$50,000. If not, a removing attorney may support federal jurisdiction by setting forth the facts in controversy -- preferably in the removal petition, but sometimes by affidavit -- that support a finding of the requisite amount.

Removal, however, cannot be based simply upon conclusory allegations. Finally, under any manner of proof, the jurisdictional facts that support removal must be judged at the time of the removal, and any post-petition affidavits are allowable only if relevant to that period of time.

63 F.3d at 1335 (citations omitted); see also Lupo v. Human Affairs Int'l, Inc., 28 F.3d 269, 273-74 (2d Cir. 1994) ("We hold that if the jurisdictional amount is not clearly alleged in the plaintiff's complaint, and the defendant's notice of removal fails to allege facts adequate to establish that the amount in controversy exceeds the jurisdictional amount, federal courts lack diversity jurisdiction as a basis for removing the plaintiff's action from state court.") (emphasis added); Reid v. Delta Gas, Inc., 837 F. Supp. 751, 752 (M.D. La. 1993) (denying motion to remand where removing party introduced deposition testimony of plaintiff and letter from neurosurgeon to establish federal jurisdiction).

These views of other federal courts are consistent with the central holding of Laughlin, as expressed by the Tenth Circuit's statement that "[t]he burden is on the party requesting removal to set forth, in the notice of removal itself, the underlying facts supporting [the] assertion that the amount in controversy exceeds \$50,000." 50 F.3d at 873.

### III.

In the instant case, neither the allegations in the petition nor the allegations in the removal documents establish the requisite jurisdictional amount. The petition alleges one claim. Plaintiff seeks damages "in excess of \$10,000" for this claim. Thus, on its face, the petition does not establish that the amount in controversy is greater than \$50,000.00.

In its removal documents, Defendant again has failed to satisfy with the requirements set forth in Laughlin and the other authorities described above. The petition for removal does not allege any underlying facts whatsoever with respect to Plaintiff's claims for damages. Instead, Defendant offers only a conclusory statement of Plaintiff's alleged damages in the petition for removal and attaches a letter signed by Plaintiff's counsel that damages sought "now exceeds the sum of \$50,000."<sup>3</sup> The Court concludes that this letter signed by Plaintiff's counsel, standing alone, does not affirmatively establish that the amount in controversy exceeds \$50,000 for purposes of diversity jurisdiction.

### IV.

Where the face of the complaint does not affirmatively establish the requisite amount in controversy, the plain language of Laughlin requires a removing defendant to set forth, in the removal documents, not only the defendant's good faith belief that the amount in controversy exceeds \$50,000, but also facts underlying defendant's assertion. In other words, a removing defendant must set forth specific facts which form the basis of its belief that there is more than \$50,000 at issue in the case. The removing defendant bears the burden of establishing federal

---

<sup>3</sup>Also attached to Defendant's notice of removal is an Application to Withdraw as Attorney of Record filed by Plaintiff's counsel in state court. Notably, this application was filed on August 7, 1996, and the letter signed by Plaintiff's counsel was dated the following day, August 8, 1996.

court jurisdiction. Laughlin, 50 F.3d at 873. And the Tenth Circuit has clearly stated what is required to satisfy that burden.

Here, as the sole underlying fact in support of its claim that the amount in controversy exceeds \$50,000.00, Defendant offers only a signature by Plaintiff's counsel on a letter from Defendant's counsel that seeks to confirm the requisite jurisdictional amount. The Court believes that under Laughlin, this is not adequate. If the face of the petition does not affirmatively establish that the amount in controversy exceeds \$50,000.00, then the rationale of Laughlin contemplates that the removing party will undertake to perform an economic analysis of the alleged damages with underlying facts. See, e.g., Michael H. Champagne v. The Prudential Insurance Company, No. 96-CV-769-H (N.D. Okla. Aug. 21, 1996). Indeed, in many cases, the removing party may be able to satisfy its burden by simply parsing out the elements of damages claimed in the petition, assuming, of course, that the total of these elements exceeds \$50,000.00. E.g., Herber, 886 F. Supp. at 20 ("Practitioners in Wyoming should be made aware that, under Laughlin, the jurisdictional allegation is determined as of the time of filing the Notice of Removal. An affidavit setting forth underlying facts will properly support a Notice of Removal."). In other cases, the removing party may seek to establish the necessary facts underlying the damages claim through discovery requests which produce "underlying facts," rather than the attorney correspondence which was tendered to the Court here.

In this case, Defendant could have specifically addressed each of Plaintiff's claims for damages set forth in the petition and sought to establish the requisite jurisdictional amount accordingly. In pertinent part, the petition states:

That during his employment, the Defendant through its agents and representatives subjected the Plaintiff to racial remarks and racial discrimination, and further discriminated against the Plaintiff with regard to his wages, hours and working conditions, because of his race, African-American.

That the representatives responsible for such conduct were known by the defendant to be prone to such conduct, yet the Defendant took no action to disavow the acts of its agents and representatives, and failed to properly recruit,



hire, train and otherwise employ individuals who would refrain from such misconduct in the course of their employment.

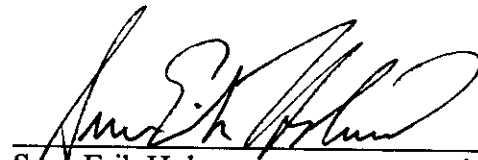
That the Plaintiff was terminated from his employment because of his race, African-American.

Thus, from the face of the petition, it is clear that Plaintiff seeks damages for lost wages, emotional distress, and future earning capacity. Initial discovery might have focused on these elements of the petition to determine whether the amount of Plaintiff's claims exceeds \$50,000.00.

Based upon a review of the record, the Court concludes that Defendant has not met its burden, as defined by the court in Laughlin. Thus, the Court is without subject matter jurisdiction and lacks the power to hear this matter. As a result, the Court must remand this action to the District Court of Tulsa County. The Court hereby orders the Court Clerk to remand the case to the District Court in and for Tulsa County.

IT IS SO ORDERED.

This 27<sup>th</sup> day of August, 1996.



Sven Erik Holmes  
United States District Judge





**FILED**  
AUG 26 1996  
Phil

Plaintiff,

**VS.**

CITY OF TULSA

Defendant.

**Case No. 96-C-717-B**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET  
DATE **AUG 27 1996**

The Petition to Intervene (Docket # 4) and Notice of Appeal (Docket #7) - by Intervenor, Boss Einstein-Burns - filed herein on August 12, 1996 and August 16, 1996, respectively, are hereby dismissed. The underlying action of Plaintiff was voluntarily dismissed on application of Plaintiff and Order of the Court on August 13, 1996. Thus, no action remained from which to appeal, assuming purported Intervenor had standing, which was not indicated on the face of the pleadings.

IT IS SO ORDERED this 26<sup>th</sup> day of August, 1996.

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

MARY BIG ELK and SAM McCLANE,

Plaintiffs,

-vs-

DONNA KASTNING, et al.,

Defendants.

AUG 26 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE **AUG 27 1996**

CASE NO. 96-C-0087-B

**AGREED JOURNAL ENTRY OF COMPROMISE, SETTLEMENT  
AND JUDGMENT DISMISSING CLAIMS WITH PREJUDICE**

This matter came before the Court on the 26<sup>th</sup> day of Aug, 1996, having been previously set for status and scheduling conference. Plaintiffs Big Elk and McClane appeared by their attorneys, Micheal Salem and Mike McBride III. The Defendants Michael Kastning, Tina Kastning and Calvin Kastning appeared by their attorneys, John David Echols and Bryan Lester Dupler.

The Court is advised by the attorneys for the above-mentioned parties only that they have entered a settlement agreement as to all claims asserted by the Plaintiffs and all counterclaims asserted by the Defendants Michael, Tina and Calvin Kastning in their Answer to the Complaint. Other named Defendants are not parties to the settlement and compromise of claims. The Court, being advised in the premises of the settlement, and in consideration of the agreement reached between the parties, therefore makes the following order:

1. All Claims present asserted, and all claims which have been, or could have been asserted by Plaintiffs in this action (including original federal claims and all pendent

claims arising under state law) against Defendants Michael Kastning, Tina Kastning and Calvin Kastning are hereby DISMISSED from this action WITH PREJUDICE, and the same are forever barred.

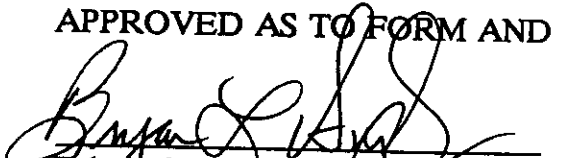
2. All counterclaims presently asserted, and all counterclaims which have been, or could have been asserted in this action by Defendants (including original federal claims and all pendent claims arising under state law) against Plaintiffs Mary Big Elk and Sam McClane, are hereby DISMISSED from this action WITH PREJUDICE, and the same are forever barred.
3. The proposed stipulated Order is not a final order of disposition of all matters before the Court and applies only to the listed parties herein and does not include any claims against other Defendants to this action consistent with tit. 12 O.S. § 832(H) and *Hoyt on behalf of the Estate of Ryan v. Miller, et al.*, No. 80,864 \_\_\_\_ P.2d \_\_\_\_, 67 O.B.J. 2308, 2312 (Okla. July 16, 1996); *Kirkpatrick v. Chrysler Corporation*, \_\_\_\_ P.2d \_\_\_\_, 67 O.B.J. 2065 (Okla. 1996).

IT IS SO ORDERED THIS 26<sup>th</sup> DAY OF Aug., 1996.

S/ THOMAS R. BRETT

HON. THOMAS BRETT  
UNITED STATES DISTRICT JUDGE


APPROVED AS TO FORM AND CONTENT:

  
Echols & Dupler, Attorneys at Law  
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(918) 299-3802

Brian Dupler, OBA #14978  
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(405) 325-3331

Attorneys for:  
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Tina Kastning  
Calvin Kastning

F:\DOC\MIKE\BIGELK\AGREED.JE

  
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(918) 583-2288

Micheal Salem, OBA #7876  
111 N. Peters, Ste. 100  
Norman, OK 73069  
(405) 366-1234

Attorneys for:  
Mary Big Elk  
Sam McClane

VERIFICATION

STATE OF OKLAHOMA

COUNTY OF Adair )

ss.

MARY BIG ELK, of lawful age, being first duly sworn on oath, states:

That, I have reviewed the attached Motion to Approve Agreed Journal Entry of Compromise, Settlement and Judgment Dismissing Claims with Prejudice and Order approving the same. I approve the form and content therein.

FURTHER AFFIANT SAITH NOT!

Mary Big Elk  
MARY BIG ELK

Subscribed and sworn to before me this 31<sup>st</sup> day of July, 1996.

Jedell M. Heath  
Notary Public

My commission expires:

9-10-97  
(Seal)



VERIFICATION

STATE OF OKLAHOMA

COUNTY OF Adair }

ss.

SAM McCLANE, of lawful age, being first duly sworn on oath, states:

That, I have reviewed the attached Motion to Approve Agreed Journal Entry of Compromise, Settlement and Judgment Dismissing Claims with Prejudice and Order approving the same. I approve the form and content therein.

FURTHER AFFIANT SAITH NOT!

Sam McClane  
SAM McCLANE

Subscribed and sworn to before me this 31st day of July, 1996.

Jodee M. Seal  
Notary Public

My commission expires:

9-10-97  
(Seal)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE AUG 27 1996

JAMES MORGAN,  
Plaintiff,  
vs.  
MYERS-AUBREY COMPANY,  
Defendants.

No. 95-C-1225-K ✓

**FILED**

AUG 26 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 26 day of August, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 8/27/96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

JOHN ZINK, MARIE JETT,  
KENT CARAWAY, SWANNIE  
TARBEL, DARTON J. ZINK, JILL  
HOTTIWATA, and MICHAEL  
BARTELL, Trustees of THE JOHN  
ZINK FOUNDATION,

Plaintiffs,

v.

A. SCOTT BROGNA, W.T.  
MOORE, MAYABB OIL COMPANY,  
UNIQUE OIL CO., and PAYSTONE  
OIL COMPANY,

Defendants.

**F I L E D**

AUG 26 1996 *SK*

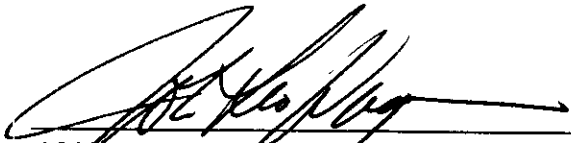
Phil Lombardi, Clerk  
U.S. DISTRICT COURT

Case No: 95-C-18-W ✓

**ORDER OF DISMISSAL WITH PREJUDICE**

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, and in accordance with the written Settlement Agreement dated July 15, 1996, Plaintiffs and Defendants dismiss all claims and counterclaims in the captioned action with prejudice. All parties agree to bear their own costs and attorneys fees incurred in this action.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the above-entitled cause of action is dismissed with prejudice to any future action.

  
JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KENNETH RAY HARRIS; ROSA  
HARRIS; STATE OF OKLAHOMA, ex  
rel. OKLAHOMA TAX COMMISSION;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

ENTERED ON DOCKET  
**AUG 26 1996**  
DATE \_\_\_\_\_

) Civil Case No. 95 C 478B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 19, 1996, pursuant to an Order of Sale dated April 4, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Seven (7), Block Nineteen (19), SUBURBAN  
HILLS ADDITION to the City of Tulsa, County of  
Tulsa, State of Oklahoma, according to the recorded  
plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, State of Oklahoma, ex rel. Oklahoma Tax Commission, Hillcrest Medical Center, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the

Defendants, Kenneth Ray Harris and Rosa Harris, by Publication, and they do not appear.

Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner  
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 478B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

UNITED STATES OF AMERICA, )  
on behalf of Consolidated Farm Service Agency, )  
formerly Rural Economic and Community )  
Development, formerly Farmers Home Administration, )

Plaintiff, )

v. )

CLAUDE L. DAVIS, JR.; )  
LINDA G. DAVIS; )  
FARM CREDIT SERVICES, )  
formerly Federal Land Bank of Wichita; )  
FIRST NATIONAL BANK OF NOWATA; )  
COUNTY TREASURER, Nowata County, )  
Oklahoma; )  
BOARD OF COUNTY COMMISSIONERS, )  
Nowata County, Oklahoma, )

Defendants. )

**AUG 22 1996**

**Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

ENTERED ON DOCKET

DATE **AUG 26 1996**

CIVIL ACTION NO. 95-C-243-B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on May 7, 1996, pursuant to an Order of Sale dated February 1, 1996, of the following described property located in Nowata County, Oklahoma:

**Lot 10, in Pin Oak Subdivision according to the amended plat thereof, a subdivision in Nowata County, Oklahoma.**

Appearing for the United States of America is Cathryn D. McClanahan, Assistant United States Attorney. Notice was given the Defendants, Claude L. Davis, Jr.; Linda G. Davis; Farm Credit Services, formerly Federal Land Bank of Wichita nka

**Farm Credit Bank of Wichita**, through its attorney **Dominic Sokolosky**; **First National Bank of Nowata**, through its attorney **James R. Johnson**; **County Treasurer and Board of County Commissioners, Nowata County, Oklahoma**, through **Stephen A. Kunzweiler**, Assistant District Attorney, Nowata County, Oklahoma, by mail, and the Purchaser, **Farm Credit Bank of Wichita**, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the **Nowata Star**, a newspaper published and of general circulation in Nowata County, Oklahoma, and that on the day fixed in the notice the property was sold to **Farm Credit Bank of Wichita, 601 East Kenosha, Broken Arrow, Oklahoma 74012**, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, **Farm Credit Bank of Wichita, 601 East Kenosha, Broken Arrow, Oklahoma 74012**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner  
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE



APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**

United States Attorney

A handwritten signature in black ink, appearing to read 'S. C. Lewis', with a long horizontal flourish extending to the right.

**CATHRYN D. MCCLANAHAN, OBA #014853**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 95-C-243-B (Davis)

CDM:cm

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID C. ALEXANDER aka David  
Clinton Alexander aka David Alexander;  
JANICE M. ALEXANDER aka Janice  
Mary Alexander aka Janice Alexander;  
SERVICE COLLECTION  
ASSOCIATION, INC.; BEVERLY  
EVANS; CITY OF BIXBY, Oklahoma;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95 C 619B

ENTERED ON DOCKET  
**AUG 26 1996**  
DATE \_\_\_\_\_

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 4, 1996, pursuant to an Order of Sale dated March 1, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Thirty-six (36), Block Three (3), BLUE RIDGE ESTATES, an Addition to the City of Bixby, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, David C. Alexander, Janice M. Alexander Service Collection Association, Inc., City of Bixby, Oklahoma, County Treasurer,

Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendant, Beverly Evans, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Bixby Bulletin, a newspaper published and of general circulation in Bixby, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner  
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95 C 619B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RONALD EUGENE HARDING aka  
Ronald E. Harding; WARREN G.  
HARDING; WILMA HARDING;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE **AUG 26 1996**

Civil Case No. 95-C 678B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 3, 1996, pursuant to an Order of Sale dated March 12, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Seventeen (17), Block Three (3), NORTHRIDGE, an Addition in Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Warren G. Harding, Wilma Harding, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

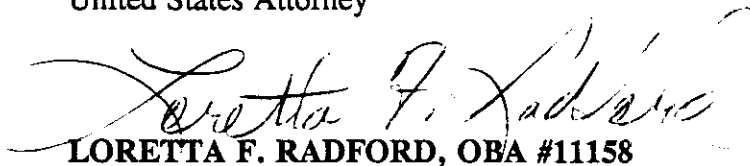
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner  
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford".

**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 678B

4

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEON U. MOODY aka LEON ULYSSES  
MOODY aka LEON V. MOODY;  
LYNDA G. MOODY aka LYNDA GENE  
MOODY aka LYNDA GEAN MOODY;  
BOATMEN'S BANK successor by merger  
to SECURITY BANK; MORTGAGE  
CLEARING CORPORATION; EAGLE  
RIDGE CONDOMINIUM  
HOMEOWNERS ASSOCIATION, INC.;  
JOHN A. JAMES; JOANNA B. JAMES;  
JEFFREY PAUL USDANSKY; STATE  
OF OKLAHOMA ex rel OKLAHOMA  
TAX COMMISSION; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

) Civil Case No. 95-C 569B

ENTERED ON DOCKET  
DATE **AUG 26 1996**

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 7, 1996, pursuant to an Order of Sale dated March 1, 1996, of the following described property located in Tulsa County, Oklahoma:

**Building 3032, Unit B and a .0135% Undivided interest  
in and to the common elements appertaining thereto in  
EAGLE RIDGE CONDOMINIUMS, PHASE III,  
according to the DECLARATION CREATING UNIT  
OWNERSHIP ESTATES FOR EAGLE RIDGE**



**CONDOMINIUMS, dated August 17, 1983, recorded in Book 4718, Page 268-349, Inclusive of the Records of Tulsa County, State of Oklahoma, and by Annexation Notice dated June 2, 1984, Recorded in Book 4800, at Pages 1067-1084, covering the following described real property, to-wit:**

**All that part of Block Thirteen (13), EASTPARK, an Addition in the City of Tulsa, Tulsa County, Oklahoma, according to the Official recorded Plat thereof, more particularly described as follows: to-wit:**

**All of Lots One (1) thru Five (5); all of Lot Six (6) Less the South 5.0 feet of the West 15.0 feet; all of Lots Seven (7) thru Eleven (11) Less the West 15.0 feet; all of Lots Twenty-six (26) thru twenty-nine (29); all that part of Lot Thirty-four (34) lying West of lot Thirty (30); all of Lots Thirty (30) thru Thirty-three (33); all that part of Lot Thirty-four (34) lying East of Lot Thirty-three (33); all that part of Lot Thirty-four (34) lying South of Lots Thirty (30) thru Thirty-three (33);**

**AND**

**All that part of Block Fifteen (15), EASTPARK, an Addition in the City of Tulsa, Tulsa County, State of Oklahoma, according to the official Recorded Plat thereof, more particularly described as follows: to-wit:**

**The North 11.95 feet of Lot Seven (7); all of Lots Eight (8) thru Seventeen (17); the Southerly 36.05 feet of Lot Eighteen (18).**

Appearing for the United States of America is Loretta F. Radford, Assistant

United States Attorney. Notice was given the Defendants, Leon U. Moody, Lynda G.

Moody, Ronald Bussert, Mortgage Clearing Corporation, Eagle Ridge Condominium

Homeowners Association, Inc., John A. James, Joanna B. James, Jeffrey Paul Usdansky, State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer, Tulsa County,

Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma and the purchaser, Tim

Bakamjian, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Tim Bakamjian, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Tim Bakamjian, a good and sufficient deed for the property.

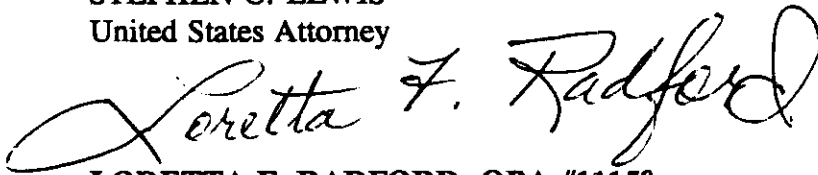
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner  
U.S. Magistrate

UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title of the signatory.

**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 569B

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of Rural Housing and Community  
Development Service, formerly Farmers Home  
Administration,

Plaintiff,

v.

DONALD R. DEACON aka Donald Ray Deacon;  
PAULA F. DEACON aka Paula Faye Deacon;  
66 FEDERAL CREDIT UNION;  
COUNTY TREASURER, Nowata County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Nowata County, Oklahoma,

Defendants.

ENTERED ON DOCKET

DATE AUG 26 1996

CIVIL ACTION NO. 95-C-1069-B

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for  
hearing before the Magistrate Judge the Motion of the United States of America to confirm the  
sale made by the United States Marshal for the Northern District of Oklahoma on May 7,  
1996, pursuant to an Order of Sale dated February 27, 1996, of the following described  
property located in Nowata County, Oklahoma:

**Lot 1, in Block 3, McConkey Addition, to the Town of Lenapah,  
Oklahoma.**

Appearing for the United States of America is Cathryn D. McClanahan,  
Assistant United States Attorney. Notice was given the Defendants, Donald R. Deacon aka  
Donald Ray Deacon; Paula F. Deacon aka Paula Faye Deacon; 66 Federal Credit Union  
through Michael J. Moyer, Assistant Vice President; County Treasurer and Board of County

Commissioners, Nowata County, Oklahoma, through Lisa Birdwell, Assistant District Attorney, Nowata County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Nowata Star, a newspaper published and of general circulation in Nowata County, Oklahoma, and that on the day fixed in the notice the property was sold to the **United States of America on behalf of Rural Housing Service**, formerly Rural Housing and Community Development Service, formerly Farmers Home Administration, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the **United States of America on behalf of Rural Housing Service**, formerly Rural Housing and Community Development Service, formerly the Farmers Home Administration, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

S/John L. Wagner  
U.S. Magistrate

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UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney

A handwritten signature in black ink, appearing to read 'S. C. Lewis', with a long horizontal flourish extending to the right.

**CATHRYN D. MCCLANAHAN, OBA #014853**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 95-C-1049-B (Deacon)

CDM:cm

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**  
AUG 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DOYLE ALLEN CLAGG,

Plaintiff,

vs.

BUCK JOHNSON, ROGERS COUNTY  
SHERIFF'S OFFICE,

Defendants.

CASE NO. 95-C-709-B ✓

ENTERED ON DOCKET  
DATE AUG 26 1996 ✓

**ORDER**

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge.

In accordance with 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72(b), any objections to the Report and Recommendation must be filed within ten (10) days of the receipt of the report. The time allowed for filing objections to the Report and Recommendation has expired and no objections have been filed.

Based upon a review of the Report and Recommendation of the Magistrate Judge, the Court hereby adopts the Report and Recommendation [Dkt. 2] DISMISSING THIS CASE WITHOUT PREJUDICE.

SO ORDERED this 23<sup>rd</sup> day of August, 1996.

  
THOMAS R. BRETT

UNITED STATES DISTRICT CHIEF JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ELMER D. BELL

Plaintiff,

vs.

CONTINENTAL BAKING CO.,  
a corporation

Defendant.

Case No. 95-C-769-E

ENTERED ON DOCKET  
AUG 26 1996  
DATE

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Elmer D. Bell, and the Defendant, Continental Baking Co., jointly stipulate and agree that this action should be and is hereby dismissed with prejudice, each side to bear his or its own costs, attorneys' fees and expenses.

JEFF NIX, OBA #

NIX, RINN & DAUBERT

2121 S. COLUMBIA, SUITE 710

TULSA, OK 74117-3521

(918) 742-4486

MADALENE A. B. WITTERHOLT, OBA # 10,528

- Of the Firm -

CROWE & DUNLEVY

A Professional Corporation

500 Kennedy Building

321 South Boston

Tulsa, Oklahoma 74103-3313

(918) 592-9800

(918) 592-9801 FAX

ATTORNEYS FOR CONTINENTAL BAKING CO



ENTERED ON DOCKET  
DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

BILLY B. BERRY;  
MARY CATHRINE BERRY;  
FEDERAL NATIONAL MORTGAGE  
ASSOCIATION;  
RESOLUTION TRUST CORPORATION, as  
Conservator for Standard Federal Savings Association,  
Transferee of Resolution Trust Corporation,  
as Receiver for Standard Federal Savings Bank;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 95-C-636-C

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for  
hearing before the Magistrate Judge the Motion of the United States of America to confirm the  
sale made by the United States Marshal for the Northern District of Oklahoma on May 9,  
1996, pursuant to an Order of Sale dated February 27, 1996, of the following described  
property located in Tulsa County, Oklahoma:

**Lots Two (2) and Three (3), Block Seven (7), NORTHGATE  
THIRD ADDITION, an Addition in Tulsa County, State of  
Oklahoma, according to the recorded plat thereof.**

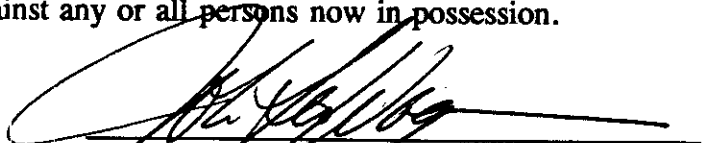
Appearing for the United States of America is Phil Pinnell, Assistant United  
States Attorney. Notice was given the Defendants, Billy B. Berry; Mary Cathrine Berry;

**Federal National Mortgage Association; Resolution Trust Corporation, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank; and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.**

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the **United States of America on behalf of the Secretary of Veterans Affairs**, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the **United States of America on behalf of the Secretary of Veterans Affairs**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

ENTERED ON CLERK

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARY J. COOPER aka Gary James  
Cooper; NAOMI M. COOPER aka Naomi  
Marie Cooper; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

Civil Case No. 95-C 424C

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 3, 1996, pursuant to an Order of Sale dated March 18, 1996, of the following described property located in Tulsa County, Oklahoma:

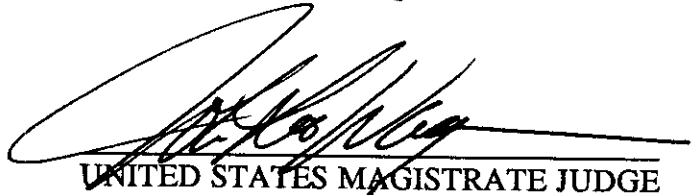
**Lot Five (5), Block Eleven (11), DOLLIE-MAC  
ADDITION, an Addition to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the Recorded  
Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma and the purchaser, Paulino Allande, by mail, and to the Defendants, Gary J. Cooper and Naomi M. Cooper, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Paulino Allande, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Paulino Allande, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.



UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET  
DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LUTHER LEE CRISWELL; CONNIE  
CRISWELL; COUNTY TREASURER,  
Mayes County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Mayes  
County, Oklahoma,

Defendants.

Civil Case No. 95 C 843C ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on July 1, 1996, pursuant to an Order of Sale dated April 25, 1996, of the following described property located in Tulsa County, Oklahoma:

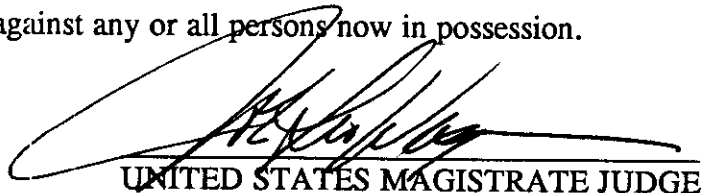
**Lot Thirteen (13), Block Fifty-four (54), Original Township of Pryor Creek, Mayes County, Oklahoma, according to the recorded plat and original survey thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer and Board of County Commissioners, Mayes County, Oklahoma, by mail, and to the Defendants, Luther Lee Criswell and Connie Criswell, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Pryor Daily Times, a newspaper published and of general circulation in Mayes County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

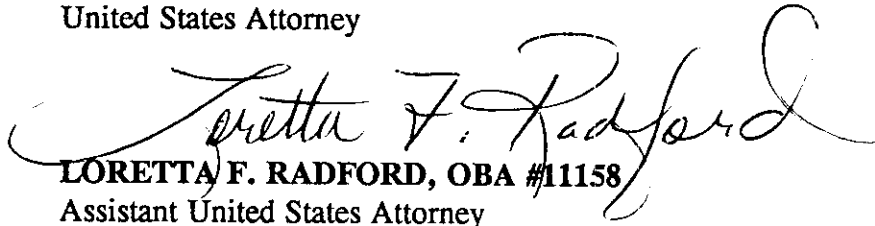
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.



UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford". The signature is written in black ink and is positioned above the printed name and title of the signatory.

**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 843C

ENTERED ON DOCKET



ENTERED ON DOCKET

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICIA R. STEDHAM; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

Civil Case No. 95-C 1059E ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 7, 1996, pursuant to an Order of Sale dated March 1, 1996, of the following described property located in Tulsa County, Oklahoma:

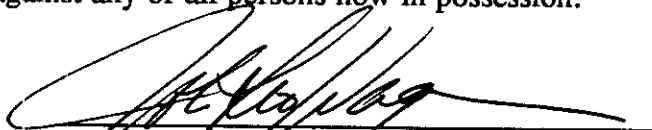
Lot Five (5), in Block Fourteen (14), in ROBERTS  
ADDITION, an Addition to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the recorded  
plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Patricia R. Stedham, State of Oklahoma, ex rel. Oklahoma Tax Commission, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma, and to the purchaser, Leonard Warren, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Leonard Warren, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

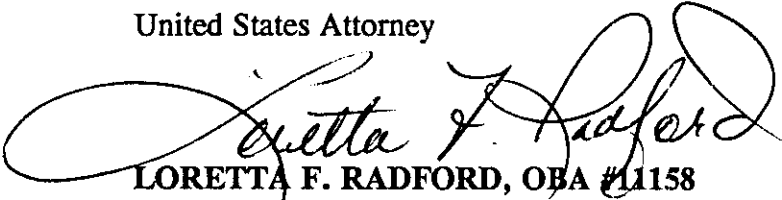
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Leonard Warren, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in black ink, reading "Loretta F. Radford". The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 1059E

ENTERED ON CLERK'S  
DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
SHARON TOLBERT aka SHARON )  
JONES; UNKNOWN SPOUSE IF ANY )  
OF SHARON TOLBERT aka SHARON )  
JONES; TULSA DEVELOPMENT )  
AUTHORITY; COUNTY TREASURER, )  
Tulsa County, Oklahoma; BOARD OF )  
COUNTY COMMISSIONERS, Tulsa )  
County, Oklahoma, )  
 )  
Defendants. )

Civil Case No. 95-C 740E ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 22, 1996, pursuant to an Order of Sale dated February 15, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Seven (7), Block Seventeen (17), SUBURBAN HILLS  
ADDITION to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded Plat thereof.

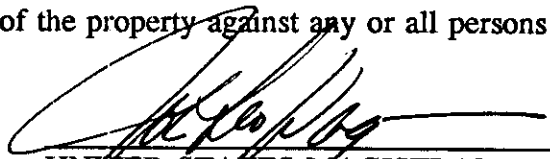
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Sharon Tolbert aka Sharon Jones and Unknown Spouse, by publication; and to the Defendants, Tulsa Development Authority, through its attorney, Darven Brown, and County Treasurer and Board of County

Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

ENTERED ON DOCKET

DATE 8-26-96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 23 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CLAUDE WADKINS, )  
)  
Petitioner, )  
)  
vs. )  
)  
RON CHAMPION, )  
)  
Respondent. )

No. 96-CV-680-H

ORDER OF TRANSFER


Before the court are Petitioner's motion for leave to proceed in forma pauperis and an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

Upon review of the petition, it has come to the court's attention that Petitioner was convicted in Pushmataha County, Oklahoma, which is located within the territorial jurisdiction of the Eastern District of Oklahoma. Therefore, in the furtherance of justice, this matter may be more appropriately addressed in that district. **ACCORDINGLY, IT IS HEREBY ORDERED that:**

- (1) Petitioner's motion for leave to proceed in forma pauperis is granted;
- (2) Petitioner's application for a writ of habeas corpus is **transferred** to the Eastern District of Oklahoma for all further proceedings. See 28 U.S.C. § 2241(d).

(3) The Clerk shall **mail** a copy of the petition to the  
Attorney General's Office and Petitioner.

IT IS SO ORDERED this 23<sup>RD</sup> day of August, 1996.

  
\_\_\_\_\_  
SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

ENTERED ON DOCKET

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES GEORGE aka James W. George;  
ANDEARY GEORGE aka Andeary F.  
George; JIM L. FORTNER; STATE OF  
OKLAHOMA, ex rel. OKLAHOMA TAX  
COMMISSION; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

) Civil Case No. 95 C 613H

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 3, 1996, pursuant to an Order of Sale dated March 15, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Four (4), Block Two (2), ORF'S TRACTS  
ADDITION to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, James George, Andeary George, State of Oklahoma ex rel. Oklahoma Tax Commission, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the



Defendant, Jim L. Fortner, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 613H

ENTERED ON DOCKET

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

ROBERT E. ZIEGLER;  
CITY OF TULSA, Tulsa, Oklahoma;  
RESOLUTION TRUST CORPORATION, as  
Conservator for Standard Federal Savings Association,  
Transferee of Resolution Trust Corporation,  
as Receiver for Standard Federal Savings Bank;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

CIVIL ACTION NO. 95-C-555-H ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 26, 1996, pursuant to an Order of Sale dated January 19, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Three (3), Block One (1), MIXON TROTTER HEIGHTS  
ADDITION to the City of Tulsa, Tulsa County, State of  
Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Peter Bernhardt, Assistant  
United States Attorney. Notice was given the Defendant, **Robert E. Ziegler**; the Defendant,  
**City of Tulsa, Tulsa, Oklahoma**, through Alan L. Jackere, Assistant City Attorney; the

18

Defendant, **Resolution Trust Corporation, as Conservator for Standard Federal Savings Association, Transferee of Resolution Trust Corporation, as Receiver for Standard Federal Savings Bank,** through John M. Buckley, Executive Secretary and Jim Williamson, Acting Assistant General Counsel; the Defendants, **County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma,** through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Purchasers, **Gordon Fritz and Karon Fritz,** by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to **Gordon Fritz and Karon Fritz, 2908 East 73rd Street, Tulsa, Oklahoma 74136,** they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

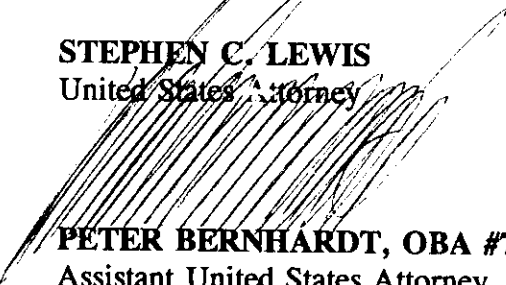
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, **Gordon Fritz and Karon Fritz, 2908 East 73rd Street, Tulsa, Oklahoma 74136,** a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchasers be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney



**PETER BERNHARDT, OBA #741**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 95-C-555-H (Ziegler)

PB:cas

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY CATHERINE SWAYNE;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Civil Case No. 95-C 1084H ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 24, 1996, pursuant to an Order of Sale dated February 21, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Fifteen (15), Block One (1), THREE LAKES II, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof, LESS AND EXCEPT that part being more particularly described as follows, to-wit: BEGINNING at the Northeasterly corner of Lot 15, Block 1; thence Westerly along the North line of said Lot 15 on a curve to the right a distance of 36.36 feet to a point; thence Southwesterly a distance of 185.35 feet to the Southeasterly corner of said Lot 15; thence Northeasterly along the Easterly line of said Lot 15, a distance of 213.01 feet to the Point of Beginning.

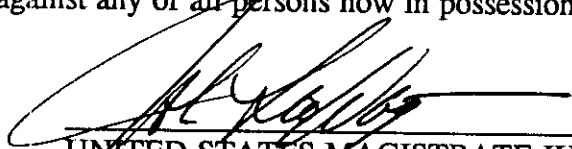
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Mary Catherine Swayne, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County,

Oklahoma and the purchaser, Jarry Jones, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 1084H



UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TERRY WAYNE WATSON;  
UNKNOWN SPOUSE IF ANY OF  
TERRY WAYNE WATSON; EDWARD  
LEON REA; UNKNOWN SPOUSE IF  
ANY OF EDWARD LEON REA; STATE  
OF OKLAHOMA ex rel OKLAHOMA  
TAX COMMISSION; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,  
Defendants.

Civil Case No. 95-C 697H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 23, 1996, pursuant to an Order of Sale dated February 22, 1996, of the following described property located in Tulsa County, Oklahoma:

LOT SIX (6), BLOCK SIX (6), VAL-CHARLES ADDITION  
TO THE CITY OF TULSA, TULSA COUNTY, STATE OF  
OKLAHOMA, ACCORDING TO THE RECORDED PLAT  
THEREOF.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Terry Wayne Watson and Unknown Spouse, and Edward Leon Rea and Unknown Spouse, by publication; and to the Defendants, State of Oklahoma ex rel, Oklahoma Tax Commission, through Kim D. Ashley,

Assistant General Counsel, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

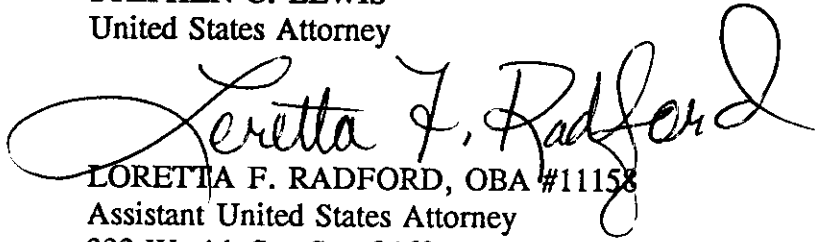
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 697H

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NORA MARIE ALVARADO aka Nora  
Spencer aka Nora M. Alvarado; STATE  
OF OKLAHOMA, ex rel. OKLAHOMA  
TAX COMMISSION; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Civil Case No. 95-C 549H

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 24, 1996, pursuant to an Order of Sale dated January 23, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Three (3), Block Five (5), BOMAN ACRES  
ADDITION, a Subdivision to the City of Tulsa, Tulsa  
County, State of Oklahoma, according to the recorded  
Plat thereof.**

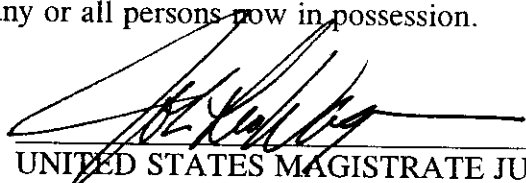
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County, Oklahoma, State of Oklahoma, ex rel. Oklahoma Tax Commission and to the purchaser of the property, Jarry M. Jones, by mail,

and to the Defendant, Nora Marie Alvarado, by publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 549H

ENTERED ON DOCKET

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIE RAY CRAWFORD;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

) Civil Case No. 95-C 378H

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on March 21, 1996, pursuant to an Order of Sale dated November 21, 1995, of the following described property located in Tulsa County, Oklahoma:

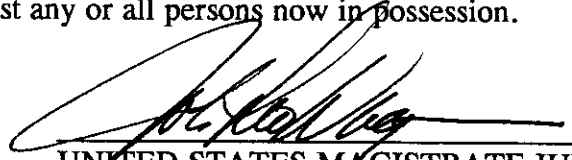
**LOT FIFTEEN (15), BLOCK ONE (1), MARY-ELLEN  
ADDITION TO TULSA, TULSA COUNTY, STATE OF  
OKLAHOMA, ACCORDING TO THE RECORDED  
PLAT THEREOF.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendant, Willie Ray Crawford, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

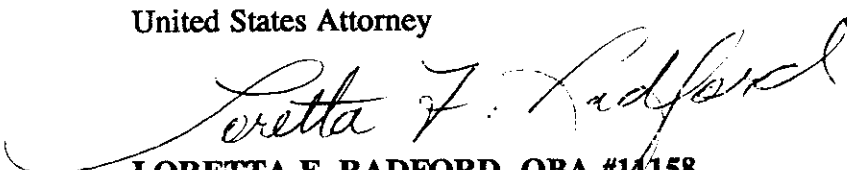


UNITED STATES MAGISTRATE JUDGE



APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 378H

ENTERED ON  
DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JANICE WATKINS aka JANICE  
DEE'ANN WATKINS; OSTEOPATHIC  
HOSPITAL FOUNDERS ASSOCIATION  
dba Tulsa Regional Medical  
Center formerly Oklahoma  
Osteopathic Hospital; CITY OF  
SAND SPRINGS, Oklahoma; FORD  
MOTOR CREDIT COMPANY; COUNTY  
TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Civil Case No. 95-CV 887H

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 17, 1996, pursuant to an Order of Sale dated March 12, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Five (5), Block Three (3), STONEY  
RIDGE, An Addition to the City of Sand  
Springs, County of Tulsa, State of  
Oklahoma, according to the Recorded Plat  
thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Janice Watkins aka Janice Dee'Ann Watkins, Osteopathic Hospital Founders Assoc. dba Tulsa Regional Medical Center fna Oklahoma Osteopathic Hospital c/o James M. McCallum,

City of Sand Springs, Oklahoma, through its attorney, Ron Cates, Ford Credit Motor Company through its attorney, William L. Nixon, Jr., and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing

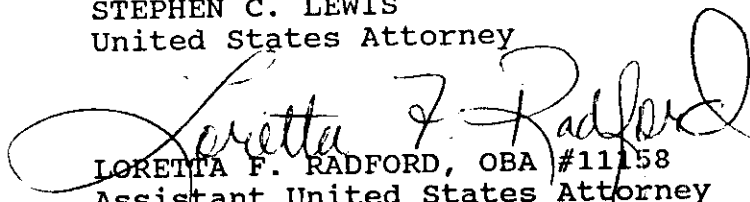
and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

  
LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-CV 887H

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

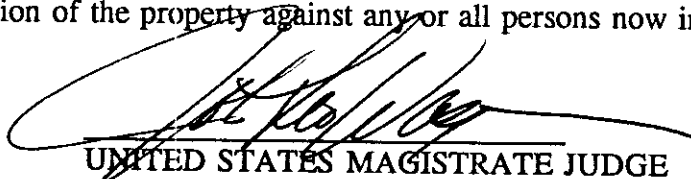
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

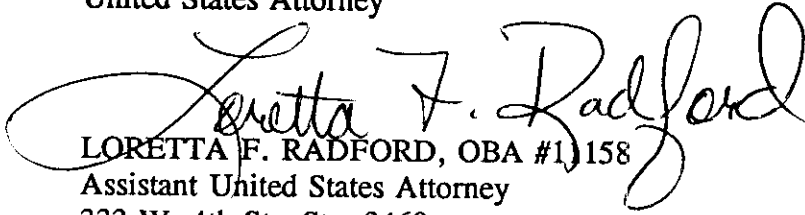
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 692H

DATE 8-26-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,  
on behalf of the Secretary of Veterans Affairs,

Plaintiff,

v.

GLADYS C. HORN aka Gladys Carlene Horn;  
CENTRAL AIR DISTRIBUTORS;  
COUNTY TREASURER, Tulsa County,  
Oklahoma;  
BOARD OF COUNTY COMMISSIONERS,  
Tulsa County, Oklahoma,

Defendants.

) CIVIL ACTION NO. 95-C-596-H

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on May 9, 1996, pursuant to an Order of Sale dated February 27, 1996, of the following described property located in Tulsa County, Oklahoma:

**Lot Thirty-nine (39), Block Forty-five (45), Valley View Acres  
Second Addition to the City of Tulsa, Tulsa County,  
Oklahoma, according to the recorded plat thereof.**

Appearing for the United States of America is Peter Bernhardt, Assistant United States Attorney. Notice was given the Defendant, Gladys C. Horn aka Gladys Carlene Horn, by mail; the Defendant, Central Air Distributors, by publication; the Defendants, County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma, by mail; and



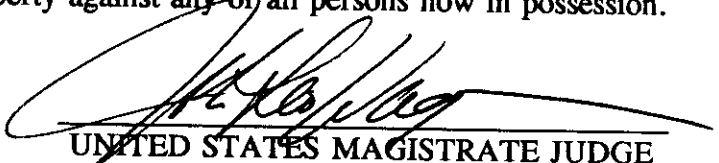
the Purchasers, **William Waggoner and Karen Waggoner**, by mail, and they do not appear.

Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to **William Waggoner and Karen Waggoner, 808 East Toledo, Broken Arrow, Oklahoma 74012**, they being the highest bidders. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchasers, **William Waggoner and Karen Waggoner, 808 East Toledo, Broken Arrow, Oklahoma 74012**, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchasers by the United State Marshal, the purchaser be granted possession of the property against ~~any or~~ all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

**STEPHEN C. LEWIS**  
United States Attorney

**PETER BERNHARDT, OBA #741**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

Report and Recommendation of United States Magistrate Judge  
Case No. 95-C-596-H (Horn)

PB:cas

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SARAH JANE RANEY; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

ENTERED ON DOCKET  
DATE **AUG 23 1996**

Civil Case No. 96CV 149BU

**JUDGMENT OF FORECLOSURE**

This matter comes on for consideration this 22<sup>nd</sup> day of August, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendant, SARAH JANE RANEY, appears not, but makes default.

The Court further finds that the Defendant, SARAH JANE RANEY, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning May 17, 1996, and continuing through June 21, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does

not know and with due diligence cannot ascertain the whereabouts of the Defendant, SARAH JANE RANEY, and service cannot be made upon said Defendant by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known address of the Defendant, SARAH JANE RANEY. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the party served by publication with respect to her present or last known place of residence and/or mailing address. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendant served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on March 18, 1996; and that the Defendant, SARAH JANE RANEY, has failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, SARAH JANE RANEY, is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT THREE (3), BLOCK TEN (10), MOELLER  
HEIGHTS, AN ADDITION IN TULSA COUNTY,  
STATE OF OKLAHOMA, ACCORDING TO THE  
RECORDED PLAT THEREOF.

The Court further finds that on May 8, 1986, J. Robert Gray and Kathryn N. Gray, executed and delivered to United Bankers Mortgage Corporation, their mortgage note in the amount of \$71,622.00, payable in monthly installments, with interest thereon at the rate of Nine percent (9%) per annum.

The Court further finds that as security for the payment of the above-described note, J. Robert Gray and Kathryn N. Gray, Husband and Wife, executed and delivered to United Bankers Mortgage Corporation, a mortgage dated May 8, 1986, covering the above-described property. Said mortgage was recorded on June 3, 1986, in Book 4946, Page 1186, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 8, 1986, United Bankers Mortgage Corporation, assigned the above-described mortgage note and mortgage to Mortgage Investment Corporation. This Assignment of Mortgage was recorded on August 26, 1986, in Book 4965, Page 970, in the records of Tulsa County, Oklahoma. A corrected Assignment was recorded on October 29, 1986, in Book 4973, Page 279, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 20, 1989, Mortgage Investment Corporation, assigned the above-described mortgage note and mortgage to the Secretary of

Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on January 27, 1989, in Book 5163, Page 2275, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, SARAH JANE RANEY, currently holds the record title to the property via mesne conveyances and is the current assumptor of the subject indebtedness.

The Court further finds that on February 1, 1989, the Defendant, SARAH JANE RANEY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached by these same parties on July 1, 1991 and December 1, 1991.

The Court further finds that the Defendant, SARAH JANE RANEY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, SARAH JANE RANEY, is indebted to the Plaintiff in the principal sum of \$111,536.50, plus interest at the rate of 9 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, SARAH JANE RANEY, is in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendant, SARAH JANE RANEY, in the principal sum of \$111,536.50, plus interest at the rate of 9 percent per annum from April 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.67 percent per annum until paid, plus the costs of this action, and any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that the Defendants, SARAH JANE RANEY, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that upon the failure of said Defendant, SARAH JANE RANEY, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

**First:**

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

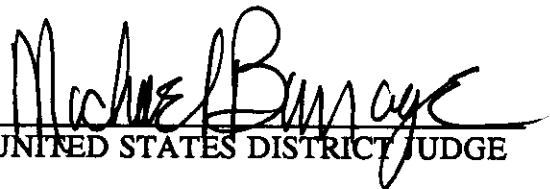
**Second:**

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

**IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

  
UNITED STATES DISTRICT JUDGE



APPROVED:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463



**DICK A. BLAKELEY, OBA #852**

Assistant District Attorney

406 Tulsa County Courthouse

Tulsa, Oklahoma 74103

(918) 596-4842

Attorney for Defendants,

County Treasurer and

Board of County Commissioners,

Tulsa County, Oklahoma

Judgment of Foreclosure  
Civil Action No. 96CV 149BU

LFR:flv

ENTERED ON DOCKET  
DATE 8-23-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CONNELL WILLIAMS; RAMONA K.  
WILLIAMS; FORD CONSUMER  
CREDIT COMPANY; COUNTY  
TREASURER, Tulsa County, Oklahoma;  
BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 695BU ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 24, 1996, pursuant to an Order of Sale dated February 15, 1996, of the following described property located in Tulsa County, Oklahoma:

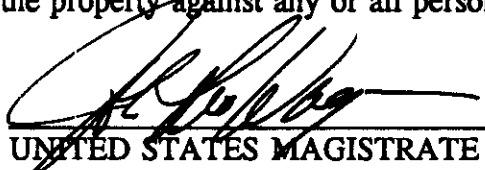
Lot Twenty-three (23), Block Seven (7), FAIRHILL 2ND  
ADDITION, a Subdivision to the City of Tulsa, Tulsa  
County, Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Connell Williams, Ramona K. Williams, Ford Consumer Credit Company, and County Treasurer and Board of County Commissioners, Tulsa County, Oklahoma, through Dick A. Blakeley, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

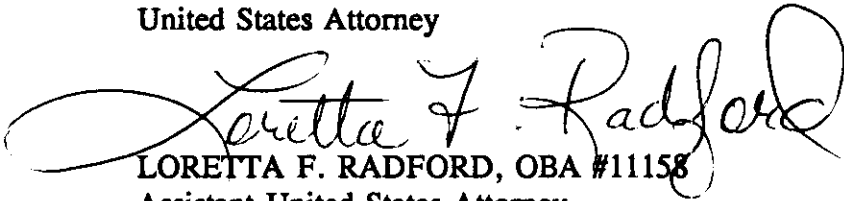
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 695BU

ENTERED ON DOCKET

DATE 8-23-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PEGGY I. THOMPSON aka PEGGY I.  
HAYNES aka PEGGY THOMPSON aka  
PEGGY IRENE THOMPSON; ROY D.  
HAYNES; DONNIE R. JACKSON aka  
DONNIE J. JACKSON; JAMES M.  
SHANNON; COUNTY TREASURER,  
Rogers County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Rogers  
County, Oklahoma,  
Defendants.

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 313BU✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on April 25, 1996, pursuant to an Order of Sale dated January 4, 1996, of the following described property located in Rogers County, Oklahoma:

Lot 7 in Block 2 of Parkland Estates III, Amended, an addition to the City of Claremore, Rogers County, Oklahoma, according to the recorded plat thereof.

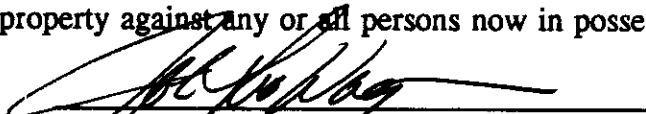
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Roy D. Haynes and Donnie R. Jackson aka Donnie J. Jackson, by publication; and to the Defendants, Peggy I. Thompson aka Peggy I. Haynes aka Peggy Thompson aka Peggy Irene Thompson, James M. Shannon c/o Richard D. Mosier, and County Treasurer and Board of County Commissioners, Rogers

County, Oklahoma, through Michele L. Schultz, Assistant District Attorney, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Claremore Daily Progress, a newspaper published and of general circulation in Rogers County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

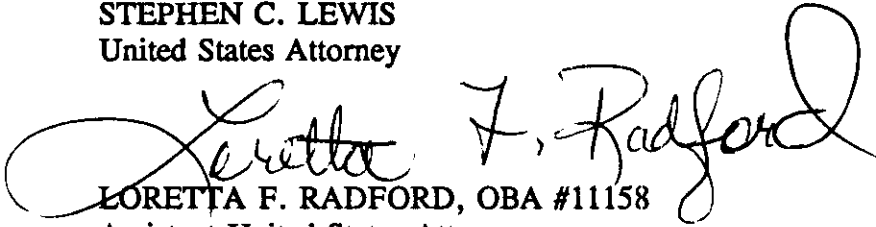
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A large, stylized handwritten signature in black ink, reading "Loretta F. Radford". The signature is written over the printed name and title of the signatory.

LORETTA F. RADFORD, OBA #11158  
Assistant United States Attorney  
333 W. 4th St., Ste. 3460  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR/esf

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 313BU

8-23-96

**FILED**

Plaintiff,

**vs.**

**LINDA BROADHURST aka Linda K. Broadhurst; UNKNOWN SPOUSE OF Linda Broadhurst aka Linda K. Broadhurst; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,**

**Defendants.**

**Civil Case No. 95-C 780BU**

AUG 22 1998  
Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
JUDICIAL DISTRICT OF NEW YORK

**Lot Forty-seven (47), Block Four (4), WEST HIGHLANDS II, an Addition to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Linda Broadhurst, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendant, Unknown Spouse of Linda Broadhurst, if any, by



publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

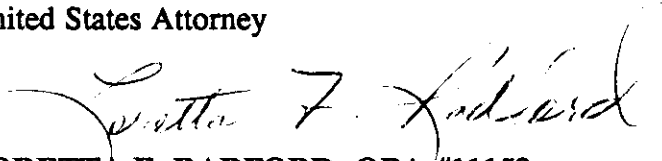
It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

A handwritten signature in cursive script, reading "Loretta F. Radford".

**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 780BU

ENTERED ON DOCKET

DATE 8-23-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GLORIA A. POTTER aka GLORIA ANN  
POTTER; DOUGLAS F. WILSON;  
KRISTI I. WILSON; GOMER G. JONES;  
SHARRON JONES; MARK G. JONES;  
LISA A. JONES; MICHAEL J. POTTER;  
UNKNOWN SOUSE, IF ANY, OF  
MICHAEL J. POTTER; SHIRLEY MAE  
POTTER fka SHIRLEY MAE FRALEY  
aka SHIRLEY MAE POULK aka  
SHIRLEY MAE KEIZOR; CITY OF  
TULSA, Oklahoma; STATE OF  
OKLAHOMA ex rel OKLAHOMA TAX  
COMMISSION; MORTGAGE  
CLEARING CORPORATION; TRIAD  
BANK, N.A.; COUNTY TREASURER,  
Tulsa County, Oklahoma; BOARD OF  
COUNTY COMMISSIONERS, Tulsa  
County, Oklahoma,

Defendants.

Civil Case No. 95-C 568BU

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 7, 1996, pursuant to an Order of Sale dated March 12, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Eighteen (18), Block Two (2), BRIARDALE  
ADDITION, to the City of Tulsa, Tulsa County,  
State of Oklahoma, according to the recorded Plat  
thereof.

25

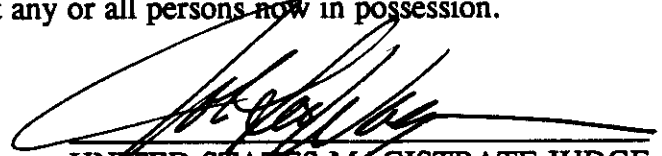
Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Mark G. Jones, Lisa A. Jones, State of Oklahoma, ex rel. Oklahoma Tax Commission, City of Tulsa, Oklahoma, Mortgage Clearing Corporation, Triad Bank, N.A., County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and to the Defendants, Gloria A. Potter, Douglas F. Wilson, Kristi I. Wilson, Gomer G. Jones, Sharone Jones, Michael J. Potter, Unknown Spouse , if any of Michael J. Potter and Shirley Mae Potter, by Publication, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of

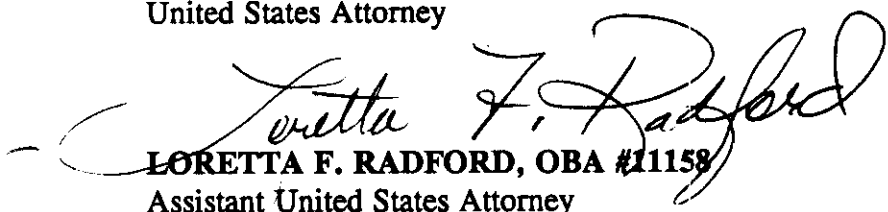
Oklahoma make and execute to the purchaser, Jarry M. Jones, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.

  
UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney

  
**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 568BU

DATE 8-23-96

UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

REBECCA K. POGUE aka Rebecca K.  
Thomison; STATE OF OKLAHOMA, ex  
rel. OKLAHOMA TAX COMMISSION;  
RED CROWN FEDERAL CREDIT  
UNION; COUNTY TREASURER, Tulsa  
County, Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,

Defendants.

Civil Case No. 95-CV 998BU ✓

**REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE**

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 7, 1996, pursuant to an Order of Sale dated March 14, 1996, of the following described property located in Tulsa County, Oklahoma:

Lot Thirteen (13), Block Four (4) BRIARWOOD, an Addition in Tulsa County, State of Oklahoma, according to the recorded plat thereof.

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Rebecca K. Pogue, State of Oklahoma, ex rel. Oklahoma Tax Commission, Red Crown Federal Credit Union, County Treasurer, Tulsa County, Oklahoma, Board of County Commissioners, Tulsa County,

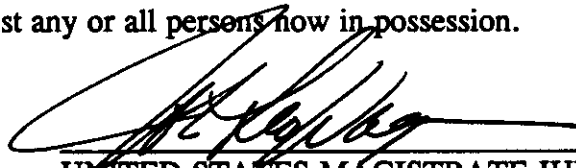
18

Oklahoma, and the purchaser, Jarry M. Jones, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal news, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to Jarry M. Jones, his being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, Jarry M. Jones, a good and sufficient deed for the property.

It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.



UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney

3460 U.S. Courthouse

Tulsa, Oklahoma 74103

(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-CV 998BU



**FILED**

Plaintiff,

**vs.**

**MARY ANNE DAY; JOHN MUETZEL  
dba C&G Laundry and C&G Corporation;  
COUNTY TREASURER, Tulsa County,  
Oklahoma; BOARD OF COUNTY  
COMMISSIONERS, Tulsa County,  
Oklahoma,**

## Defendants.

Civil Case No. 95 C 983BU

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS

NOW on this 21st day of August, 1996, there comes on for hearing before the Magistrate Judge the Motion of the United States of America to confirm the sale made by the United States Marshal for the Northern District of Oklahoma on June 4, 1996, pursuant to an Order of Sale dated March 5, 1996, of the following described property located in Tulsa County, Oklahoma:

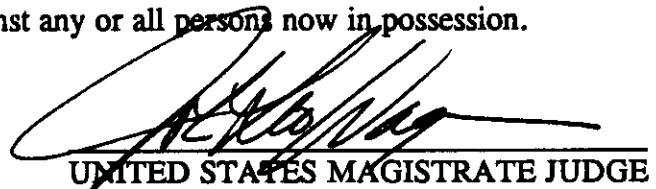
**Lot Eighteen (18), Block Three (3), DEVONSHIRE PLACE FOURTH, an Addition to the Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

Appearing for the United States of America is Loretta F. Radford, Assistant United States Attorney. Notice was given the Defendants, Marcy Anne Day, John Muetzel dba C&G Laundry and C&G Corporation, County Treasurer, Tulsa County, Oklahoma and Board of County Commissioners, Tulsa County, Oklahoma, by mail, and they do not appear. Upon hearing, the Magistrate Judge makes the following report and recommendation.

The Magistrate Judge has examined the proceedings of the United States Marshal under the Order of Sale. Upon statement of counsel and examination of the court file, the Magistrate Judge finds that due and legal notice of the sale was given by publication once a week for at least four weeks prior to the date of sale in the Tulsa Daily Commerce & Legal News, a newspaper published and of general circulation in Tulsa County, Oklahoma, and that on the day fixed in the notice the property was sold to the United States of America on behalf of the Secretary of Housing and Urban Development, it being the highest bidder. The Magistrate Judge further finds that the sale was in all respects in conformity with the law and judgment of this Court.

It is therefore the recommendation of the United States Magistrate Judge that the United States Marshal's Sale and all proceedings under the Order of Sale be hereby approved and confirmed and that the United States Marshal for the Northern District of Oklahoma make and execute to the purchaser, the United States of America on behalf of the Secretary of Housing and Urban Development, a good and sufficient deed for the property.

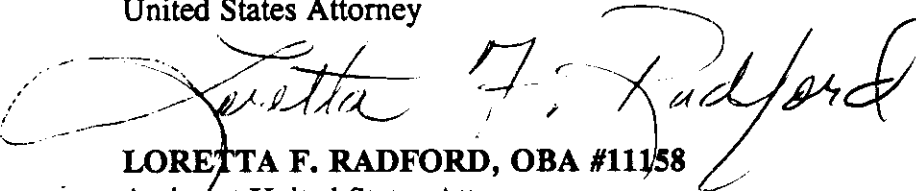
It is the further recommendation of the Magistrate Judge that subsequent to the execution and delivery of the Deed to the purchaser by the United State Marshal, the purchaser be granted possession of the property against any or all persons now in possession.



UNITED STATES MAGISTRATE JUDGE

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS  
United States Attorney



**LORETTA F. RADFORD, OBA #11158**  
Assistant United States Attorney  
3460 U.S. Courthouse  
Tulsa, Oklahoma 74103  
(918) 581-7463

LFR:flv

Report and Recommendation of United States Magistrate Judge  
Civil Action No. 95-C 983BU

ENTERED ON DOCKET

DATE 8/23/96

**F I L E D**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ED HUGHES,

Plaintiff,

v.

FRED SCHRAEDER,

Defendant.

Case No. 89-C-136-C ✓

ORDER

This order pertains to Plaintiff's Amended Application for Contempt Citation (Docket #42). A hearing was held on July 24, 1996 and oral arguments were heard.

A judgment was entered against defendant in the amount of \$10,000.00 plus interest on January 17, 1990. On March 11, 1993, defendant was ordered to appear on the first Monday of each month for an asset hearing at plaintiff's counsel's office or make a payment of \$100.00 per month to plaintiff. The last payment was made in January of 1996, and plaintiff now has filed an amended application for contempt citation (Docket #42), claiming that defendant should be found in contempt for failing to appear for such an asset hearing or make a \$100.00 payment since that date.

Defendant argues that there has been no attempt by plaintiff to execute on the judgment, as required by Okla. Stat. tit. 12, § 735.<sup>1</sup> Plaintiff did not file a general

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<sup>1</sup>This statute reads in part as follows:

If execution is not issued and filed as provided in Section 759 of this title or a garnishment summons is not issued by the court clerk within five (5) years after the date of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five (5) years has intervened between the date that the last execution on such judgment was filed or the date that the last garnishment summons was issued as provided by Section 759 of this title, and the date that writ of execution was filed or a garnishment summons was issued as also provided in Section 759 of this title, such judgment shall become unenforceable and of no effect, and shall

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execution in the county of defendant's residence or issue a garnishment summons upon that general execution, so defendant contends that any further collection procedure is barred at this time. Plaintiff argues that the court's order of March 11, 1993 complied with the execution requirement, because Fed.R.Civ.Pro. 69(a) states "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise . . .." Plaintiff offers no case law in support, and the court has found none.

The Oklahoma court in First of Denver Mortg. Investors v. Riggs, 692 P.2d 1358, 1363 (Okla. 1994), found as follows:

Creditor concedes that no writ of execution has ever been obtained on the judgment. Creditor argues that a partial payment by the debtor and a partial release by the creditor is 'tantamount' to an execution. [However,] a partial payment does not prevent the running of our dormancy statute.

The court in Chandler-Frates & Reitz v. Kostich, 630 P.2d 1287, 1290 (Okla. 1981), also concluded that the provisions of § 735 must be strictly construed and therefore:

A dormancy statute constitutes a condition imposed upon the holder of a judgment which adheres to, and is a part of, the judgment . . . . In the absence of a statute to the contrary a partial payment will not prevent the running of a dormancy statute. Similarly, ancillary proceedings such as hearings on assets and garnishment proceedings do not prolong the life of a judgment, in the absence of the issuance of a writ of execution to enforce the judgment within the statutory period.

Plaintiff has failed to execute on the judgment, as required by § 735. Further collection efforts are therefore barred. Plaintiff's Amended Application for Contempt

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cease to operate as a lien on the real estate of the judgment debtor.

Citation (Docket #42) is denied.

Dated this 21<sup>st</sup> day of August, 1996.

A handwritten signature in black ink, appearing to read "John Leo Wagner", written over a horizontal line.

JOHN LEO WAGNER  
UNITED STATES MAGISTRATE JUDGE

S:Hughes.ord

ENTERED ON DOCKET  
DATE 8/23/96

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

ANTHONY E. MARSHALL,

Plaintiff,

v.

SHIRLEY S. CHATER,  
Commissioner of the Social Security  
Administration,

Defendant.

)  
)  
)  
)  
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)

NO. 95-C-1116-M

**FILED**

AUG 22 1996 *AR*

✓ Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

**JUDGMENT**

Judgment is hereby entered for Plaintiff and against Defendant. Dated this 21st  
day of August, 1996.

*Frank H. McCarthy*  
FRANK H. MCCARTHY  
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

**AUG 22 1996**

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

JOHN J. ENZBRENNER,  
Plaintiff,

vs.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

Case No. 96-CV-553-BU

ENTERED ON DOCKET

DATE AUG 23 1996

ORDER OF DISMISSAL

Upon Application of the plaintiff, John J. Enzbrenner, Jr., and his counsel of record, Geoffrey M. Standing Bear, and for good cause shown:

IT IS HEREBY ORDERED that the above-styled and numbered lawsuit, and each claim thereof, shall be and the same is hereby dismissed upon the merits and with prejudice to any future action as to the defendant, State Farm Mutual Automobile Insurance Company, each party to bear its own costs, expenses and attorney's fee.

Dated this 22<sup>nd</sup> day of August, 1996.

s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

MARK LEE WOLFE,

Petitioner,

vs.

L.L. YOUNG,

Respondent.

No. 96-CV-389-BU

AUG 23 1996

**ORDER**

This matter comes before the Court on Respondent's motion to dismiss this habeas corpus action for failure to exhaust state remedies, filed on June 11, 1996. (Doc. #3.) Petitioner, a pro se litigant, has not responded.<sup>1</sup>

The Supreme Court "has long held that a state prisoner's federal petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims." Coleman v. Thompson, 111 S. Ct. 2546, 2554-55 (1991). To exhaust a claim, Petitioner must have "fairly presented" that specific claim to the Oklahoma Court of Criminal Appeals. See Picard v. Conner, 404 U.S. 270, 275-76 (1971). The exhaustion

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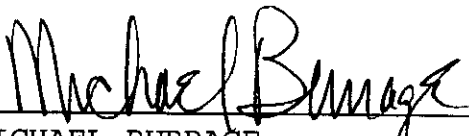
<sup>1</sup> On July 22, 1996, the Court granted Petitioner until August 5, 1996, to file a response to Respondent's motion to dismiss and notified him that his failure to file a response would result in the dismissal of this action.

requirement is based on the doctrine of comity. Darr v. Burford, 339 U.S. 200, 204 (1950). Requiring exhaustion "serves to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights." Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam).

It is clear from the record in this case that Petitioner has not exhausted all the various grounds for relief he has alleged. Moreover, Petitioner's failure to object to Respondent's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.

Accordingly, Respondent's motion to dismiss (docket #3) is **granted** and the petition for a writ of habeas corpus is hereby **dismissed without prejudice**.

IT IS SO ORDERED this 22<sup>nd</sup> day of August, 1996.

  
\_\_\_\_\_  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 22 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

ROB PASSLEY,

Plaintiff,

vs.

Case No. 96-C-273-BU ✓

A-1 FREEMAN NORTH AMERICAN,  
INC., an Oklahoma corporation,

Defendant.

ENTERED ON DOCKET

DATE AUG 23 1996

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 22<sup>nd</sup> day of August, 1996.

  
MICHAEL BURRAGE  
UNITED STATES DISTRICT JUDGE

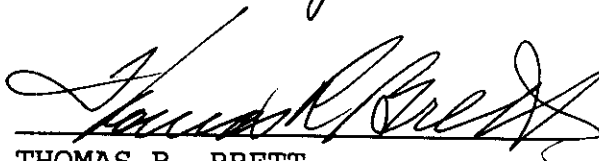
FILED  
AUG 21 1996

DATE AUG 22 1996

ACCORDINGLY, IT IS HEREBY ORDERED that this action is summarily DISMISSED without prejudice pursuant to Rule 4 of the Rules Governing Section 2254 cases. In the alternative, the Court

dismisses this action for lack of prosecution.

SO ORDERED THIS 21<sup>st</sup> day of Aug, 1996.

A handwritten signature in cursive script, appearing to read "Thomas R. Brett", written over a horizontal line.

THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is

frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that

Plaintiff's claim lack an arguable basis in law. Plaintiff's claim contains no more than conclusory allegations. "Constitutional rights allegedly invaded, warranting an award of damages, must be specifically identified. Conclusory allegations will not suffice." Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981).

Furthermore, the Court notes that Plaintiff has failed to allege whether Davis and Ward were personally involved in the alleged violations at issue in this case. It is well established that a defendant may not be held liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988).<sup>1</sup>

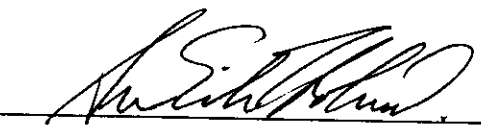
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<sup>1</sup> To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates. For instance, a supervisor may be found liable (1) if after learning of the constitutional deprivation through a report or appeal, the supervisor failed to remedy the wrong; (2) if the supervisor created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or (3) if the supervisor was grossly negligent in managing the subordinates who caused the unlawful condition or event. See Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).



ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is **granted** and this action is hereby **dismissed** without prejudice as frivolous. The Clerk shall **mail** a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 21<sup>st</sup> day of August, 1996.

  
SVEN ERIK HOLMES  
UNITED STATES DISTRICT JUDGE

5532-000

ENTERED ON DOCKET  
DATE 8-22-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BANK ONE, DAYTON, N.A.,

Plaintiff,

vs.

MIAMI TIRE SERVICE, INC.,  
CARL R. MOSELEY and  
CAROLYN K. MOSELEY, individually)  
and doing business as  
MOSELEY LEASING,

Defendants.

**FILED**

AUG 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

Case No. 96-CV-456-H ✓

JUDGMENT IN A CIVIL CASE

The parties announced at the Case Management Conference that this Judgment is to be entered. The signatures of the respective attorneys of record confirm that the terms of this Judgment conform to their agreement.

IT IS ORDERED AND ADJUDGED:

1. That Judgment is entered in favor of Bank One, Dayton, N.A. against Miami Tire Service, Inc. in the principal sum of Thirty-Five Thousand Nine Hundred Fifty-Six and 31/100 Dollars (\$31,956.31), together with interest accruing thereon at the daily rate of Nine and 82/100 Dollars (\$9.82) from January 23, 1996, until paid.


2. That Judgment is entered in favor of Bank One, Dayton, N.A. against Miami Tire Service, Inc. in the principal sum of Forty-Four Thousand Seven Hundred Sixty-Nine and 43/100 Dollars (\$44,769.43), together with interest accruing thereon at the daily rate of Thirteen and 14/100 Dollars (\$13.14).

3. Bank One, Dayton, N.A. will file with this Court a notification regarding whether or not the other two Defendants, Carl R. Moseley and Carolyn K. Moseley, are granted a discharge in their Chapter 7 bankruptcy proceeding pending in the United States Bankruptcy Court for the Northern District of Oklahoma in Case No. 96-2679-C. That notice is to be filed herein within ten (10) days of the Bankruptcy Court's decision regarding the discharge issue.


4. There is no just reason for delaying the entry of a final Judgment as to Miami Tire Service, Inc.; therefore, final Judgment is entered against that entity as contemplated by Fed.R.Civ.P. 54(b) and Bank One, Dayton, N.A. may execute upon the same within the time frame set forth in Fed.R.Civ.P. 62(a).

  
Hon. Sven Erik Holmes, Judge

APPROVED AS TO FORM AND CONTENT:

  
J. Patrick Mensching  
Barrow Gaddis Griffith & Grimm  
610 S. Main, Suite 300  
Tulsa, OK 74119-1248  
(918) 584-1600

ATTORNEYS FOR BANK ONE, DAYTON, N.A.

  
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jbh 8/5/96

8-22-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GILBERT R. SUITER, an individual,

Plaintiff,

-vs-

Case No. 93-C-815-H ✓

MITCHELL MOTOR COACH SALES, INC.,

a Florida corporation,

NORMA J. DESBIEN, Individually, and

NORMA J. DESBIEN, as Personal

Representative of the Estate of

ROBERT E. DESBIEN, Deceased,

Defendants,

and

BLUE BIRD BODY COMPANY, INC.,

a Georgia corporation,

Third-Party

Defendant.

**FILED**

AUG 21 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

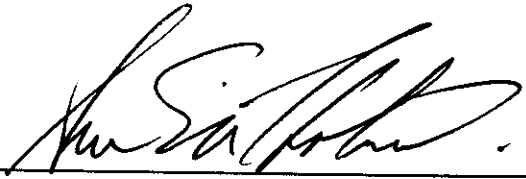
ORDER OF RULE 54(b) CERTIFICATION

This matter comes on for consideration upon Plaintiff's Application for a Rule 54(b) certification of Judgments previously entered herein. For good cause shown, the Court finds that the Application should be granted.

The Court hereby makes the express determination pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that there is no just reason for delay, and expressly directs that the Court's Order of April 25, 1995 granting summary judgment in favor of Blue Bird Body Company, Inc.; the Court's Judgment of April 3, 1996 in favor of the Plaintiff and against Mitchell Motor Coach Sales, Inc. and the related awards of interest, costs and

attorneys' fees to Suiter; and the grant of default Judgment in favor of Suiter and Mitchell Motor Coach Sales, Inc. and against the Estate of Robert E. Desbien are all final judgments pursuant to Rule 54(b).

DATED this 21<sup>st</sup> day of August, 1996.

  
SVEN ERIK HOMES, JUDGE OF THE U.S.  
DISTRICT COURT FOR THE NORTHERN  
DISTRICT OF OKLAHOMA

FILED  
AUG 20 1996

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

DAVID LAWRENCE DODD, JR., )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
TULSA COUNTY JAIL, et al., )  
 )  
Defendants. )

No. 96-CV-580-B ✓

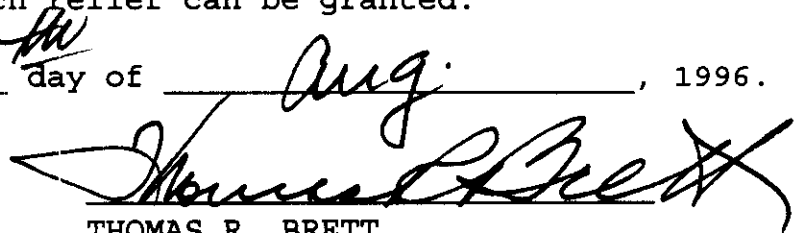
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DATE AUG 21 1996

ORDER

On July 12, 1996, the Court granted Plaintiff leave to proceed in forma pauperis, and on July 24, 1996, advised Plaintiff that this action would be dismissed for failure to state a claim unless Plaintiff would file a motion for leave to amend within twenty days. Plaintiff has failed to respond. Moreover, the July 12th Order was returned to the Court on July 22, 1996, with the notation "Return to Sender."

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby DISMISSED WITHOUT PREJUDICE for lack of prosecution. In the alternative, the Court dismisses Plaintiff's complaint for failure to state a claim upon which relief can be granted.

SO ORDERED THIS 20<sup>th</sup> day of Aug., 1996.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 20 1996

CHARLES E. CRABTREE,

Plaintiff,

vs.

RON ISSAC and PAT WIGGINS,

Defendants.

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

No. 96-C-708-B

ENTERED ON DOCKET  
DATE AUG 21 1996

**ORDER**

Plaintiff, an inmate at the Tulsa County Jail, has filed a motion for leave to proceed in forma pauperis and a civil rights complaint against Medical Administrator Ron Issac and Nurse Pat Wiggins. He contends Defendants have failed to apply an ointment to a rash on his back which he cannot reach on his own. He alleges that Defendants' failure to administer this minor medical treatment has caused the rash to return to his arms and spread to his thighs. Plaintiff requests damages for each day Defendants have failed to help him apply the cream to his back and \$750.00 for pain and suffering.

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to

review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se pleadings, see



Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack an arguable basis in law. The Eighth Amendment prohibits prison officials from being deliberately indifferent to the serious medical needs of prisoners in their custody.<sup>1</sup> Estelle v. Gamble, 429 U.S. 97, 104 (1976).

Plaintiff alleges no facts to show that his medical condition is serious and that Defendants acted with deliberate indifference. Plaintiff's allegations amount at the most to negligence which is not cognizable in this civil rights action. West v. Atkins, 487 U.S. 42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041

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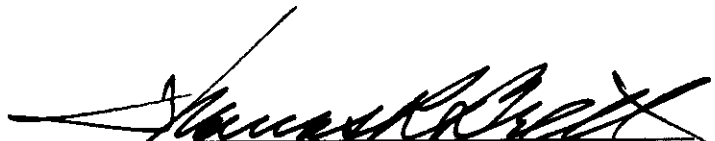
<sup>1</sup> Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

(1981).<sup>2</sup>

Lastly, the Prison Litigation Reform of 1996 limits the filing of civil actions by prisoners for mental or emotional injury suffered while in custody without a prior showing of physical injury. Pub. L. No. 104-134, 110 Stat. 1321, section 803. Plaintiff has not alleged a physical injury as a result of the conditions of confinement at the Tulsa County Jail. Therefore, this action should be dismissed as frivolous.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is GRANTED and this action is DISMISSED without prejudice as it lacks an arguable basis in law. The Clerk shall mail a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 20<sup>th</sup> day of Aug., 1996.



THOMAS R. BRETT  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DOLLAR RENT A CAR SYSTEMS, INC. )

Plaintiff, )

vs. )

E & J RENTAL & LEASING, INC., )  
a corporation; N. DAVID JOHNSON, an )  
individual; and O. L. ECK, an individual, )

Defendants. )

ENTERED ON DOCKET

DATE AUG 21 1996

Case No. 95-C-458-K ✓

**FILED**  
AUG 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**FINAL ORDER AND JUDGMENT**

The captioned matter came before this Court for jury and non-jury trial, the Court having previously determined that the parties waived their rights to a jury trial only as to the claims for amounts owed under the terms of the Master Lease Agreement and Guarantee. (See Order of March 15, 1996.) Plaintiff Dollar Rent A Car Systems, Inc. ("Dollar"), and Defendants E&J Rental & Leasing, Inc. ("E&J"), N. David Johnson ("Johnson") and O. L. Eck all appeared personally or by counsel. The claims for amounts owed under the terms of a second agreement, the License Agreement, and Defendants' counterclaim, were tried to a jury. The jury was empaneled and sworn; it heard the evidence, the charges of the Court and the argument of counsel; and it returned its verdict in favor of Plaintiff, on Dollar's claims for amounts owed under the terms of the License Agreement, in the amount of \$25,000. The jury also returned its verdict in favor of Defendants, in the amount of \$15,000, on their counterclaim.

Dollar filed a Motion for Judgment as a Matter of Law, pursuant to Fed.R.Civ.P. 50, on its claim for prejudgment interest and on Defendants' counterclaim. By Order entered July 2, 1996, the Court granted Dollar's motion with regard to Defendants' Counterclaim. By Order

entered July 29, 1996, the Court denied Dollar's motion with regard to Dollar's breach of contract claim for prejudgment interest owed under the terms of the License Agreement.

The Court, after hearing the evidence of witnesses and arguments of counsel on the claims arising under the terms of the Master Lease Agreement and Guarantee, found in favor of Dollar for the sum of \$75,803.14. Findings of Fact, Conclusions of Law and Order and Judgment were entered on July 10, 1996, with regard to this claim. By Order entered August 16, 1996, the Court altered or amended that Judgment to reflect that the Judgment is not only against E&J, but also against Defendant Johnson, the individual who guaranteed the Master Lease Agreement on behalf of E&J.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants take nothing by reason of their counterclaim.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Dollar recover judgment of and from Defendants E&J, Johnson and O.L. Eck for the sum of \$25,000 on the claims arising under the terms of the License Agreement, plus post-judgment interest at the statutory rate as follows:

5.60% per annum from May 1, 1996 to May 22, 1996;  
5.62% per annum from May 23, 1996 to June 19, 1996;  
5.89% per annum from June 20, 1996 to July 17, 1996;  
5.81% per annum from July 18, 1996 to August 14, 1996; and  
5.67% per annum from August 15, 1996 to September 11, 1996.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Dollar recover judgment of and from Defendants E&J and Johnson for the sum of \$75,803.14 on the claims arising under the terms of the Master Lease Agreement, plus post-judgment interest at the statutory rate as follows:

5.89% per annum from July 10, 1996 to July 17, 1996;  
5.81% per annum from July 18, 1996 to August 14, 1996; and  
5.67% per annum from August 15, 1996 to September 11, 1996.

Dollar's Bill of Costs and Application for Attorney Fees will be resolved by separate order  
of the Court.

IT IS SO ORDERED THIS 16 DAY OF AUGUST, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET  
DATE AUG 2

DOLLAR RENT A CAR SYSTEMS, INC. )

Plaintiff, )

vs. )

Case No. 95-C-458-K ✓

E & J RENTAL & LEASING, INC., )  
a corporation; N. DAVID JOHNSON, an )  
individual; and O. L. ECK, an individual )

Defendants. )

**FILED**

AUG 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

**ORDER**

**GRANTING DOLLAR'S MOTION TO ALTER OR AMEND JUDGMENT**

This matter arises upon the application of the Plaintiff, Dollar Rent A Car Systems, Inc. ("Dollar"), for an order altering or amending the Judgment, entered July 10, 1996, to reflect that the Judgment is not only against E&J Rental & Leasing, Inc. ("E&J"), but also against Defendant N. David Johnson, the individual who guaranteed the Master Lease Agreement on behalf of E&J. Being advised in the premises, and for good cause shown, this Court finds that the motion should be granted.

IT IS THEREFORE ORDERED that the Judgment, entered July 10, 1996, is altered or amended to reflect that the Judgment is also against Defendant N. David Johnson.

DATE: August 16, 1996

  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**FILED**

AUG 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

KENNETH L. WOODWARD,

Plaintiff,

vs.

BUCK JOHNSON, Rogers County  
Sheriff's Department; NANCY LUPER,

Defendants.

No. 95-C-373-K

ENTERED ON DOCKET  
DATE AUG 21 1996

ORDER

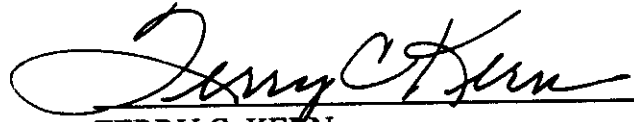
NOW before this Court is the Report and Recommendation of Magistrate Judge McCarthy [Doc. 12] concerning Defendants' motion to dismiss or for summary judgment filed on September 18, 1995 [Doc. 7].

By Order dated December 14, 1995, Plaintiff was advised that pursuant to Fed.R.Civ.P. 12(b)(6), Defendants' motion would be treated as one for summary judgment, that his response was due within 15 days, and that failure to respond may result in an entry of summary judgment against him. Plaintiff did not respond. On April 5, 1996, another Order was entered, allowing Plaintiff until May 6, 1996 in which to file a response. Again no response was filed by Plaintiff.

Therefore, pursuant to Local Rule 56.1, the Magistrate Judge found that all material facts set forth by Defendants were deemed admitted as a result of Plaintiff's failure to respond. The Magistrate Judge recommended that Defendants' motion to dismiss or for summary judgment be granted and this action dismissed without prejudice.

Having reviewed the report and recommendation, and there being no objections filed, the Court finds that the report and recommendation [Doc. 12] is ADOPTED, that Defendants' motion to dismiss or for summary judgment [Doc. 9] is GRANTED, and that this action is DISMISSED WITHOUT PREJUDICE.

SO ORDERED THIS 19 DAY OF August, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM G. BROWN and JUDY  
BROWN,

Plaintiffs,

vs.

FRED C. VARNARSDALE, JEFF  
CURTZ, TOMMY OSBORN, JR.,  
NATIONAL AMERICAN INSURANCE  
CO. and UNDERWRITERS SURETY,  
INC.,

Defendants.

No. 95-C-272-K

ENTERED ON DOCKET  
DATE AUG 21 1996

**FILED**

AUG 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the third-party defendants' motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the third-party defendants Fred C. Vanarsdale, National American Insurance Company, and Underwriters Surety, Inc., and against the third-party plaintiff Tommy Osborn, Jr.

ORDERED this 16 day of August, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WILLIAM G. BROWN and JUDY  
BROWN,

Plaintiffs,

vs.

FRED C. VARNARSDALE, JEFF  
CURTZ, TOMMY OSBORN, JR.,  
NATIONAL AMERICAN INSURANCE  
CO. and UNDERWRITERS SURETY,  
INC.,

Defendants.

**FILED**

AUG 20 1996

No. 95-C-272-K

Phil Lombardi, Clerk  
U.S. DISTRICT COURT

ENTERED ON DOCKET

**FILED**

DATE AUG 21 1996

AUG 20 1996

ORDER

Before the Court is the motion of the third-party defendants for summary judgment as to the cross-claims of defendant/third-party plaintiff Tommy Osborn, Jr. At the Court's request, the parties submitted supplemental briefing, which the Court has reviewed. This action began when plaintiffs, William and Judy Brown, sued the defendants, alleging trespass, assault and battery, false imprisonment, intentional and negligent infliction of emotional distress and kidnapping.

The underlying facts are that on July 16, 1994, William Brown was arrested for various offenses in Butler County, Kansas. Defendant Vanarsdale, a bail bondsman, posted a \$1,000.00 bond on Brown's behalf. Defendant National American was the insurer whose money was being supplied for the bond. Defendant Underwriters serves as a "manager" for National American.

After Vanarsdale posted the bond, Brown was released and

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returned to Oklahoma, where he lives. He then "jumped bail" by failing to appear for two hearings. The Kansas court forfeited the bond. The bond sureties then sought to have Brown arrested. Underwriters contracted with defendant Curtz<sup>1</sup>, a bounty hunter, to perform this function.

On January 7, 1995 Curtz called Brown and asked if he intended to return to Butler County. Brown replied he was discussing the matter with his lawyer. On January 9, Brown telephoned the Butler County District Attorney. The District Attorney's Office and Brown met January 11, 1995. It was agreed the prosecution would be deferred for twelve months. The trial court set aside the bond forfeiture, but did not order the bond exonerated. Nothing in the record indicates the agreement and deferred prosecution were communicated to the defendants.

Around January 23, 1995, Curtz sought to travel to Brown's house and arrest him. Curtz asked defendant/third-party plaintiff Osborn to accompany him, and Osborn agreed. None of the other defendants were notified Osborn would take part in the arrest. Curtz and Osborn traveled to Brown's house. Curtz broke a door to the house, apprehended Brown, and put him in handcuffs. Osborn claims he acted only as a witness, and stayed outside the house. Curtz and Osborn transported Brown to Butler County, Kansas.

The Browns sued in the District Court of Osage County, and the action was removed to this Court on March 24, 1995. Defendant Osborn filed a third-party complaint September 15, 1995 against Underwriters for indemnity and negligence. On the same date,

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<sup>1</sup>Mr. Curtz is now deceased.

Osborn filed an amended answer and asserted cross-claims against his co-defendants for indemnity and negligence. The plaintiffs and defendants achieved settlement and on January 9, 1996, the Court entered an order dismissing plaintiffs' claims. Osborn concedes this dismissal negates his indemnity claim, but he contends material issues of fact remain regarding his negligence claim.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).

The threshold question in any suit based upon negligence is whether the defendant had a duty to the particular plaintiff alleged to be harmed. Grover v. Superior Welding, Inc., 893 P.2d 500, 502 (Okla.1995). The elements needed in proving actionable negligence are: (1) existence of a duty on defendant's part to protect plaintiff from injury; (2) violation of that duty; and (3) injury resulting therefrom. Id. Whether a defendant stands in such relationship to a plaintiff that the law will impose upon the defendant an obligation of reasonable conduct for the benefit of

the plaintiff is a question for the court. Wofford v. Eastern State Hosp., 795 P.2d 516, 519 (Okla.1990).

The "Investigators Agreement", i.e., the contract between Curtz and Underwriters, (Exhibit K in defendants' appendix) states in section 4 that Curtz is an independent contractor and the company is not responsible for any actions taken by him in violation of state or federal law. It further provides Curtz will hold the company harmless from any liability. Nowhere does the agreement mention Curtz obtaining the assistance of others in effecting an arrest. No evidence has been presented showing any defendant knew Osborn would assist Curtz. Defendants rely on the general rule relating to independent contractors:

Generally, an employer is not liable for the torts of an independent contractor, but there are many exceptions to the rule. The rule in Oklahoma is that a person who performs work through an independent contractor is not liable for damages to third persons caused by the negligence of the contractor except where the work is inherently dangerous or unlawful or where the employer owes a contractual or defined legal duty to the injured party in the performance of the work.

Hudgens v. Cook Industries, Inc., 521 P.2d 813, 815 (Okla.1974).

However, Osborn contends he is seeking to hold the defendants liable for their own negligence, not that of Curtz. He states the failure of defendants to check the status of the bond forfeiture and the arrest warrant breached a duty owed by defendants to Curtz and Osborn to warn them that the arrest might be invalid.<sup>2</sup> How did

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<sup>2</sup>Defendants cite Oklahoma and Kansas law and assert that, because the bond had not been exonerated, a right to arrest under the bond still existed. Apparently, Osage County officials disagree with this interpretation, as they have arrested Mr. Osborn

this duty, arguably owed to Curtz, extend to Osborn, a person unknown to defendants? Osborn argues: "Osborn's injuries were foreseeable because the defendants knew or should have known that Curtz would have someone accompany him because it is reasonable and in fact necessary for a bounty hunter to be accompanied by another person at bounty hunter's request to witness the arrest for legal as well as safety reasons." (Osborn's brief at 10-11).

Defendants argue Osborn constitutes, at most, a volunteer. The only duty to volunteers is to refrain from willful or wanton conduct. Nye v. Cox, 440 P.2d 683, 688 (Okla.1968); Hughes v. Shanafelt, 218 P.2d 350 (Okla. 1950). No showing of willful or wanton conduct on defendants' part has been made by Osborn. Osborn argues he was in fact an employee of Curtz, although he received no money. Osborn states in an affidavit that Curtz paid for Osborn's refreshments and other aspects of the trip, and it was understood Curtz would assist Osborn in Osborn's business, in exchange for Osborn's services.

Attaining employee status does not enable Osborn to survive the pending motion. An employer who hires an independent contractor does not have a duty to warn employees of the independent contractor of dangers which are inherent in the work to be performed.<sup>3</sup> See Hatley v. Mobil Pipe Line Co., 512 P.2d 182

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for kidnapping. The Court need not resolve the issue of lawfulness.

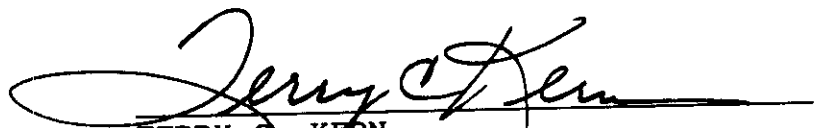
<sup>3</sup>This specific common law rule trumps Osborn's discussion of general foreseeability rules. In any event, the Court would decline to adopt a "bounty hunter" rule, whereby it is considered foreseeable as to certain professions that independent contractors will request assistance.

(Okla.1973). Cf. Scott v. Thunderbird Industries, Inc., 651 P.2d 1346, 1349 (Okla. Ct. App.1982). Despite Osborn's argument to the contrary, the Court concludes the risk of making an unlawful arrest is one inherent to the profession of bounty hunting.

If the contract between Curtz and defendants contained language reserving control of the operation to the defendants, or which imposed a duty on defendants to check the status of the bond, Osborn would be entitled to proceed with his cause of action. No such showing has been made.

It is the Order of the Court that the motion of the defendants for summary judgment as to cross-claims of defendant Tommy Osborn, Jr. (#61) is hereby granted. The motion of defendants for summary judgment as to plaintiff's claims (#47) is denied as moot, in view of plaintiff's dismissal of his claims and the Court's Order of January 9, 1996.

ORDERED this 16 day of August, 1996.

  
TERRY C. KERN  
UNITED STATES DISTRICT JUDGE

8-21-96

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**F I L E D**

IN RE:

WILLIAM R. KELLEY, aka  
WILLIAM ROBERT KELLEY,  
and CAROL JO KELLEY,

Debtors.

THE EMPLOYERS WORKERS'  
COMPENSATION ASSOCIATION,  
an Unincorporated Group Self-Insurance  
Association,

Appellant,

vs.

BILL KELLEY, an individual, d/b/a  
BILL KELLEY & ASSOCIATES,

Appellee.

AUG 20 1996

Phil Lombardi, Clerk  
U.S. DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA

CASE NO. 96-C-499-H ✓

**REPORT AND RECOMMENDATION**

The instant appeal from the United States Bankruptcy Court for the Northern District of Oklahoma is before the undersigned United States Magistrate Judge for report and recommendation. *Griego v. Padilla*, 64 F.3d 580 (10th Cir. 1995). The appeal has been fully briefed and an advisory hearing was held before the undersigned on July 24, 1996.

The Employers Workers' Compensation Association ("TEWCA") appeals from the order of the Bankruptcy Court, Stephen J. Covey, J., dismissing its adversary proceeding for failure to timely file its complaint for determination of dischargeability. Relying on *In re Green*, 876 F.2d 854 (10th Cir. 1989), the Bankruptcy Court determined that ten or eleven days "was sufficient notice to permit the filing of a

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complaint objecting to the dischargeability of its debt." *In re Kelley*, 194 B.R. 258, 261 (Bankr.N.D.Okl. 1996).

This appeal raises the question of whether actual notice<sup>1</sup> to a creditor of the deadline for filing nondischargeability complaints, not properly scheduled, is adequate under Bankruptcy Rule 4007(c) when the notice is received ten or eleven days in advance of the deadline.

Under Bankr. Rule 4007(c), a complaint to determine the dischargeability of a debt must be filed within 60 days of the first meeting of creditors. The date on which this 60-day period expires is called the bar date. The rule also provides that the court shall give all creditors not less than 30 days notice of the bar date. Specifically, Rule 4007(c) provides:

A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). **The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired. [emphasis supplied].**

According to TEWCA, under Rule 4007(c), if a creditor receives less than 30 days notice of the bar date, it has not had enough time within which to file its

---

<sup>1</sup> This case does not raise the issue of inquiry notice; therefore, that issue is not addressed in this report and recommendation.

nondischargeability complaint and therefore is not subject to the bar. The Bankruptcy Court, relying on *Green*, rejected TEWCA's position:

This argument, while not discussed in *Green*, was implicitly rejected by the United States Court of Appeals for the Tenth Circuit. In *Green*, the creditor, Yukon, received less than thirty days notice of the bar date and yet the court held that Yukon had received sufficient notice to timely file its complaint. [citation omitted].

*Kelley*, 194 B.R. at 261.

This Court finds that *Green* did not "implicitly reject," or even address the Rule 4007(c) 30-day notice argument. *Green* resolved only the issue of whether actual notice can satisfy the official court notice called for in Rule 4007(c). Therefore, this Court finds that the Tenth Circuit's decision in *In re Green* does not mandate the result reached by the Bankruptcy Court and RECOMMENDS REVERSAL OF THE BANKRUPTCY COURT'S DECISION AND REMAND FOR FURTHER PROCEEDINGS as hereafter discussed.

#### **FACTS AND PROCEDURAL HISTORY**

The following facts recited by the Bankruptcy Court are not in dispute:

Debtor filed for protection under Chapter 7 of the United States Bankruptcy Code on April 27, 1995. Appellant TEWCA was listed on the schedule of creditors but TEWCA's correct address was not listed. Neither TEWCA nor its counsel received Notice of Commencement of Case or other notice of Debtor's bankruptcy until counsel for TEWCA received a document entitled "Notice of Pending Bankruptcy" ("court notice") which was filed in a case pending between Debtor and TEWCA in

state court.<sup>2</sup> The court notice was mailed by Debtor's counsel July 19, 1995 and was received by TEWCA counsel July 20, 21 or 22, 1995. A copy of the Bankruptcy Court's Notice of Commencement of Case ("bankruptcy notice") which set July 31, 1995 as the deadline to file a complaint objecting to discharge of the debtor was attached to the court notice. The Bankruptcy Court therefore found that TEWCA received ten or eleven days actual notice of the July 31, 1995 bar date. TEWCA filed its complaint alleging nondischargeability due to willful and malicious injury to property of another on September 29, 1995, sixty days beyond the bar date.<sup>3</sup>

### **JURISDICTION AND STANDARD OF REVIEW**

The District Court has jurisdiction over this appeal under 28 U.S.C. § 158. The Bankruptcy Court's legal conclusions are subject to *de novo* review. *Phillips v. White (In re White)*, 25 F.3d 931, 933 (10th Cir. 1994). The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988). This appeal involves review of the Bankruptcy Court's conclusions of law.

### **DISCUSSION**

In *In re Green*, 876 F.2d 854 (10th Cir. 1989), the Tenth Circuit determined that where the creditor does not receive formal notice of the petition for bankruptcy

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<sup>2</sup> According to representations of counsel at the advisory hearing, the court notice was filed in response to a motion for summary judgment filed by TEWCA in state court Case No. CJ-93-2298.

<sup>3</sup> Debtor has not asserted that TEWCA's complaint is barred because it was not filed within 30 days of TEWCA's actual notice; therefore, that issue is not addressed in this report and recommendation.

under Chapter 7, but has actual knowledge of the bar date shortly after filing, the creditor is bound by the bar date. *Id.* at 855. The *Green* court stated: "the Code 'clearly contemplates' that actual notice of a bar date **received in time to file a complaint** to determine dischargeability will foreclose an untimely complaint." *Id.* [emphasis supplied]. The *Green* Court ruled that "[w]hen a creditor receives notice of a bar date **in time sufficient to act**, the requirement of due process is satisfied." *Id.* at 857 [emphasis supplied]. However, *Green* does not establish a rule or provide any guidance for determining when notice will be considered received "in time sufficient to act." The present case asks the very question not answered by *Green*: What does "in time sufficient to act" mean? Or, more specifically: Is actual notice of the bar date received ten or eleven days before that date "in time sufficient to act"?

The *Green* opinion does not state when the creditor in that case obtained actual knowledge of the bar date. Instead, the opinion vaguely states that the knowledge came "shortly after filing." *Id.* at 855. The opinion recounts that the record contained billing statements of the creditor's attorney reflecting "research regarding bankruptcy motion to debtor" on August 11, 1986. *Id.* The bar date was September 2, 1986. From this information one could conclude that the Tenth Circuit's decision was based on the fact that creditor had twenty-two days notice of the bar date and that the Tenth circuit rejected the 30-day notice requirement of Rule 4007(c). Yet, the Court framed its ruling in terms of "actual knowledge shortly after filing." The Tenth Circuit's use of the language "actual notice shortly after filing" counsels against

acceptance of the Bankruptcy Court's interpretation of *Green* and rejection of the 30-day notice requirement in the present case.

Statutory interpretation requires a court to adhere to the plain meaning of the statute and to endeavor to give effect to all sections and words. *Resolution Trust Corp. v. Westgate Partners, Ltd.*, 937 F.2d 526, 529 (10th Cir. 1991). The second sentence of Rule 4007(c) mandates that a creditor receive "not less than 30 days notice" of the expiration of the sixty-day period for filing dischargeability complaints before the Bankruptcy Court may foreclose the creditor's right to participate in the process. Irrespective of the Rule 4007(c) mandate, the Bankruptcy Court in this case ruled that "[t]en or eleven days [notice] is more than sufficient time to prepare a complaint to determine dischargeability or to request an extension of time in which to file such a complaint." *Kelley*, 194 B.R. at 262. This ruling is contrary to the plain language of Rule 4007(c).

Although the Tenth Circuit has not addressed the issue of whether Rule 4007(c) requires thirty days notice of the bar date before a creditor's dischargeability complaint may be barred as untimely, other courts have concluded that the thirty days notice is required. See *Manufacturers Hanover v. Dewalt (In re Dewalt)*, 961 F.2d 848 (9th Cir. 1992); *Sophir Company v. Heiney (In re Heiney)*, 194 B.R. 898 (D.Colo. 1996); *Shaheen v. Penrose (In re Shaheen)*, 174 B.R. 424 (E.D. Va., 1994); *Harper v. Burrier (In re Burrier)*, 184 B.R. 32 (Bankr. N. D. Ohio, 1995); *Contra, Grossie v. Sam (In re Sam)*, 894 F.2d 778 (5th Cir. 1990).

In *In re Dewalt, supra*, the Ninth Circuit was faced with circumstances similar to the instant case. There, the Bankruptcy Court dismissed a complaint objecting to dischargeability which was filed over four months after the bar date because the creditor knew of the bankruptcy six or seven days before the bar date. The Bankruptcy Appellate Panel affirmed but the Ninth Circuit reversed, holding that the creditor had to have more than six or seven days notice of the bar date. Although the Court did not hold that the 30 days notice provided by Rule 4007(c) was an absolute minimum required in every case, it did state that "the 30-day notice provision of Rule 4007(c) provides a guide to the minimum time within which it is reasonable to expect a creditor to act at penalty of default." *Id.* at 851. The Court went on to comment that "in the great majority of cases, 30 days advance knowledge of the case is both necessary and sufficient to satisfy section 523(a)(3)(B)." *Id.* Other Courts take the position that the 30 day notice provision of 4007(c) establishes the minimum notice required. *Shaheen*, 174 B.R. at 427; *Burrier*, 184 B.R. at 34.

The *Dewalt* Court stated that the bankruptcy court ruling "unfairly punishes creditors by holding them to the highest standards of diligence in a situation caused by the negligence of the debtor, and rewarding the debtor, in effect, for negligent filing." *Id.* 961 F.2d at 850. In addition, the Ninth Circuit stated that placing creditors in a position where a motion for extension of time is the only option seemed to be contrary to the language of section 525(a)(3)(B) which refers to actual notice

in time to permit a request for a determination of dischargeability, not actual notice in time to move for an extension of time. *Id.*<sup>4</sup>

Establishing 30 days as the minimum notice required, serves several important functions. First, it gives meaning to the second sentence of Rule 4007(c) which provides: "The court shall give all creditors not less than 30 days notice of the [bar date]." [emphasis supplied]. It provides certainty to creditors concerning what course of action they are required to take to prevent their rights from being foreclosed, thereby promoting uniformity of treatment for all creditors. Finally, it releases the court from conducting a case-by-case analysis to determine whether under varying circumstances 1, 10, or 20 days will be considered sufficient notice to permit the filing of a complaint objecting to the dischargeability of a debt.

This Court is of the opinion that § 523(a)(3)(B) must be read in conjunction with the second sentence of Rule 4007(c) thereby requiring that a creditor have 30 days notice of the bar date before the bar date will preclude the filing of a complaint challenging the dischargeability of a debt.

The undersigned United States Magistrate Judge RECOMMENDS REVERSAL of the Bankruptcy Court's dismissal of the adversary proceeding and REMAND of the case to the Bankruptcy Court for further proceedings.

In accordance with 28 U.S.C. §636(b) and Fed. R. Civ. P. 72(b), any objections to this report and recommendation must be filed with the Clerk of the Court within

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<sup>4</sup> The Court recognizes that the 5th Circuit takes a contrary view; *In re Sam*, 894 F.2d 778 (5th Cir. 1990). However, after careful consideration, the Court finds the 9th Circuit view more persuasive.

ten (10) days of the receipt of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 20<sup>th</sup> day of August, 1996.

  
FRANK H. McCARTHY  
UNITED STATES MAGISTRATE JUDGE